Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

1. Whether the lower courts misconstrued this Court's holdings such that the Petitioner's Fourth Amendment rights were violated in admitting certain evidence and whether those holdings have and will result in violations of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the admission of a questionable confession violates the Equal Protection Clause of the Fourteenth Amendment and whether this Court's guidance in such cases is required.

3. Whether the standard of review for this circumstantial evidence case was appropriate and, if not, if the Petitioner's due process rights were violated; and whether review of such cases requires this Court's actions to ensure equal protection under the law.

4. Whether the lower courts failed to apply the appropriate standards set by this Court in admitting out-of-court identifications in violation of the Petitioner's Fourteenth Amendment rights.

5. Whether the issue of permitting expert testimony on eyewitness identifications requires this Court's intervention to resolve disputes between the several States and between the Federal circuit courts.

6. Whether the circumstances of this case were such that it constituted a violation of the Petitioner's due process rights in disallowing an expert on eyewitness testimony.

7. Whether the lower courts inappropriately applied this Court's well-established holdings in determining that a search warrant was appropriately issued and, therefore, whether the Petitioner's Fourth Amendment rights were violated by admitting evidence which was ill gotten.

8. Whether the trial court lacked venue to hear the case and whether the lower courts applied the wrong standard in making their determination.

9. Whether, with all of the errors and the violations of the Petitioner's constitutional rights, the trial was a fair trial as required under the Fourteenth Amendment. The totality of the circumstances upon which the Florida Supreme Court heavily relied overwhelmingly demonstrates that the trial was not fair and justice requires that the lower court decision be overturned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Eric Simmons, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida in this case.

OPINIONS BELOW

The Supreme Court of the State of Florida issued two opinions in Mr. Simmons' appeal of his criminal conviction, the first of which is reported at *Simmons v. State*, 934 So.2d 1100 (Fla. 2006) (App., infra, A1-44) (upholding the trial court's decision and sentence), and the second of which is not reported (*Simmons v. State*, SC04-19, July 11, 2006) (summarily denying the motion for rehearing filed by the Petitioner) (App. *infra*, B1). The Florida Supreme Court has yet to act on a motion for clarification and for the issuance of an order filed by Petitioner requesting the issuance of a decision on rehearing as the initial decision was not substantiated by the record and that an opinion would assist this Court in its consideration of the case pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure. The mandate has also not been issued pursuant to Rule 9.340 of the Florida Rules of Appellate Procedure.

JURISDICTION

The judgment of the Florida court was entered on May 11, 2006, and the rehearing denied on July 11, 2006. On October 2, 2006, this Court granted an extension of time within which to file a petition for writ of certiorari until December 8, 2006. The jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code (28 U.S.C. §1257).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner Eric Simmons, who has maintained his innocence from the inception of this case, was convicted of first degree murder, kidnapping, and sexual battery and was sentenced to death.

The conviction was obtained without the benefit of knowing where, when, or how the crimes were committed. There was no murder weapon, no murder scene, and no witnesses to the crimes. The case was purely circumstantial. The conviction was based upon the testimony of witnesses who allegedly saw the victim in a car which was identified by these witnesses as belonging to the Petitioner, albeit through very strained identifications which the State admitted were obtained through impermissibly suggestive means. The Petitioner was not seen with the victim by these "witnesses". The Petitioner was seen with the victim prior to her murder, and he did know her. The Florida Supreme Court based its decision to uphold the conviction based almost exclusively on this testimony.

Briefly, the body of Debbie Tressler was found on December 3, 2001, at about 11:30am. The medical examiner testified that it was apparent that this was not where she was killed due to a lack of sufficient blood and unspoiled ground.

Crime scene technicians from the Lake County Sheriff's Office processed the scene. They took casts of tire tracks which were chosen because they were six (6) feet in length and were of good enough quality to cast. They were not taken because they were close

to the body. They could not state that they were on the same car. In fact, other tires had gone over those tracks cast by crime scene. The State expert testified that one of the Petitioner's tires had left no tracks at the scene. One tire did not make any of the tracks located at the scene. The two (2) remaining tires could not be eliminated as leaving the tire impressions he reviewed. There were no fingerprints of any value anywhere. The medical examiner placed the time of death between 24 and 48 hours before the body was found. The Petitioner had an alibi for part of that period as he was working with his father beginning at 5:30am on December 2, 2001. This was stipulated by the State.

The victim had not been seen by anyone with whom law enforcement spoke since 10:30 pm on December 1, 2001. Jose Rodriguez testified that he saw the Petitioner with the victim at a laundromat at approximately 10:30 pm.[1] He did not see them leave. His mother, Ms. Vega, saw a man with a very different description than that of the Petitioner at the same time.

An incident was reported to law enforcement on December 1, 2001. That incident involved a white Chevrolet Corsica from which a woman was attempting to exit and yelling for assistance. The witnesses to that incident were Ms. Renfro, who was on probation for dealing in stolen property, and Mr. Montz, who had been in the prosecutor's boy scout troop. Their identifications of the vehicle and the woman seen will be discussed more fully *infra*. However, the witnesses ultimately identified the car as that of the Petitioner, although the Petitioner's car was a Ford Taurus. Ms. Renfro identified the woman she saw as Ms. Tressler, the victim. The car was heading away from where the body was found. The car never stopped.

The Petitioner's name came up during the interview with Mr. Rodriguez as the victim's boyfriend. Law enforcement ran his name and found the vehicle he owned. They looked for that vehicle. It was stipulated that the car had been towed for transmission work on December 4, 2001, and was picked up on December 7, 2001. Law enforcement had all of its manpower looking for Mr. Simmons. They had road blocks set up, a mobile command center was moving from

1. Mr. Rodriguez was incarcerated on other charges at the time he was questioned by law enforcement and was admittedly looking for a deal. The victim had called law enforcement twice concerning harassment by Mr. Rodriguez and his brother.

Mr. Simmons' home to that of his parents, and helicopter support was up.

When the Petitioner's car was located at his parents' home, the entire force moved on to that property and the helicopter was circling overhead. Law enforcement "asked" the Petitioner to join them at the Sheriff's Office. He was handcuffed and transported in the back of a marked, locked unit.

Once at the Sheriff's Office, the handcuffs were removed and law enforcement questioned Mr. Simmons. The room was hardwired for videotaping, but only a portion of the interview was taped. Mr. Simmons told law enforcement that he had tried to help the victim, including providing her work with his father. She was supposed to go to work with him on December 2, 2001, but she was not there when he went to get her. He continually stated that he had nothing to do with her death.

Law enforcement obtained a search warrant for Mr. Simmons' vehicle which had already been towed to the Sheriff's Office. The detectives told Mr. Simmons that they found some blood in his car. They claim that he said "well, I guess if you found blood in my car, I must have did it". This portion of the interview was not videotaped. The detectives claimed that that statement, which they characterized as a confession, was the only thing said which was not on tape. Mr. Simmons was arrested and nothing was done to memorialize this alleged confession.

Following the arrest, law enforcement looked in the area next to where the body was found to locate a crime scene. It met with negative results.

REASONS FOR GRANTING THE PETITION

The conviction was not based upon evidence against the Petitioner. Instead, it was based on the fact that the Petitioner may have been seen with the victim at some time prior to her death. This cannot be the basis for a conviction on any charge, let alone sufficient to take a man's life. The decision of the Florida Supreme Court is contrary to any view of justice and against the manifest weight of the evidence.

There was no evidence, circumstantial or otherwise, which would prove the homicide and sexual battery charges. The only

circumstantial evidence was related to the kidnapping charge, which was added only as an afterthought. The indictment was amended to include a kidnapping charge only after the issue concerning venue, discussed *infra*, was raised by the defense.

In reaching this decision, the lower court ignored this Court's precedence and violated the Petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

I. Review Should Be Granted Because The Florida Supreme Court Grossly Misapplied Applicable Law In Holding That The Petitioner Was Not Under Arrest

A. Review Should Be Granted Because, In Holding That The Petitioner Was Not Under Arrest, The Petitioner's Statements Were Admitted Into Evidence In Violation Of His Fourth Amendment Rights

The State court upheld the trial court's holding on the motion to suppress the alleged confession[2] on the basis that the interrogation of the Petitioner was voluntary, thereby not violating the Petitioner's Fourth Amendment rights. In so holding, the Florida Supreme Court distinguished this Court's holding in *Hayes v. Florida*, 470 U.S. 811 (1985), on the basis that the Petitioner "never expressed reluctance" to accompany the officers and the officers did not threaten to arrest him. It is conceded by the State court that the Petitioner was handcuffed and was transported to the Lake County Sheriff's Office Criminal Investigation Division's interrogation room in the back of a marked, locked police unit.

This Court has consistently held that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S 318, 323 (1994). The circumstances in this case were described

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2. The "confession" consisted of the alleged statement by the Petitioner after the officers informed him they found blood in his car. He purportedly stated that "if you found blood I must have did it". This is only purportedly the case, as law enforcement's tape had run out, had not been replaced for unexplained reasons except that no one was paying attention to it. Therefore, there is nothing which reflects that this statement was made, or under what circumstances, except for the statements of the two officers.

by the lead detective in this case at the suppression hearing before the trial court. That detective described the number of officers as a "thundering herd" that arrived at the Petitioner's family's home, including helicopters overhead. The detectives "asked" the Petitioner to accompany them to the Sheriff's Office for questioning. He was handcuffed and transported in the back of a locked unit. Certainly, the Petitioner could not have declined if he had chosen to do so. The Petitioner was under arrest at that point.

This case is analogous to that presented in *Kaupp v. Texas*, 538 U.S. 626 (2003). In *Kaupp*, this Court held that Kaupp was arrested once he was taken in handcuffs, placed in a patrol car, driven to the sheriff's office and placed in an interrogation room where he was questioned. The only distinction is that Kaupp was without his shoes. The Petitioner was outside at the time. However, there is the additional indicia of his lack of ability to turn down the officers' "invitation" by the sheer number of officers present. As in this case, Kaupp's handcuffs were removed in the interrogation room and he signed a *Miranda* waiver. Nonetheless, the statements made by Kaupp were fruit of the poisonous tree, that being the illegal arrest, and were therefore inadmissible.

It would appear from the Florida Supreme Court's decision that it may be in agreement that the Petitioner was in custody at the time of the questioning since the court goes on to state that even if that were found to be the case, the trial court's decision that there was probable cause for an arrest should be upheld. The question which remains, then, is whether, in fact, there was probable cause for this arrest.

The lead detective on the case specifically stated during the hearings on the motions to suppress that they had no probable cause for an arrest. The trial judge found there to be probable cause despite the fact that the police found none. The trial judge's application of whatever he may have believed to be known by the police at the time, was obviously not known to the arresting officers. If probable cause had existed, they certainly would not have testified that it did not. This substitution of the trial court judge's opinion over a year after the occurrence cannot be upheld. Just as a magistrate cannot act as an "adjunct law enforcement officer" in authorizing a search warrant[3], the trial judge cannot substitute his judgment for that of

law enforcement to vitiate an act which violates one's constitutional rights.

The police believed that they had no probable cause for arrest. They had been looking for the Petitioner because he had been seen with the victim several days before her body was found. They had the entire Sheriff's Office out looking for him, not based on any evidence that he had committed the murder, only that he knew her.

The Florida Supreme Court's opinion states that the Petitioner was the last person seen with the victim and that a description of a car in which the victim had allegedly been seen matched that of the Petitioner's. These statements are contrary to the record. Since it is not known when or where the victim was killed, it is sheer speculation that he was the last person to see her alive. The description of the car given by the witnesses, only one of whom claims to have seen the victim, matched the Petitioner's car in color only—that color being white. Both witnesses stated that the car they had seen was a Chevrolet Corsica. The Petitioner's car was a Ford Taurus. Neither saw the Petitioner or whoever was driving that vehicle. The description of the driver from one witness was that the driver had dark hair. The Petitioner is very fair with blond hair.

The Florida Supreme Court's statements concerning the police knowledge of prior incidents involving the Petitioner were of little significance to law enforcement since they did not believe they had probable cause for an arrest. It is also indicative of the lack of significance placed on these matters as they were not raised in trial.

The Florida Supreme Court claims to be following its precedent on the issue of probable cause by citing *Chavez v. State*, 832 So.2d 730, 747 (Fla. 2002), and *Walker v. State*, 707 So.2d 300, 312 (Fla. 1997), as stating that "[p]robable cause for arrest exists where an *officer* 'has reasonable grounds to believe that the suspect has committed a felony'. The standard of conclusiveness and probability is less than that required to support a conviction." (Emphasis added.) The court fails to make mention that the officer did not believe that he had probable cause. Only the trial court judge did. If law enforcement had probable cause, they could have secured an arrest warrant. There was more than ample time for this as they had spent their

3. *United States v. Leon*, 468 U.S. 897, 914 (1984).

entire "investigative" time searching for the Petitioner. He was not arrested until several days after the victim's body was found.

Since there was no probable cause for an arrest, but, in fact, there was an arrest, any statements made during the interrogation subsequent to that arrest, inasmuch as there were no intervening circumstances which would wash the taint, must be suppressed. The Florida Supreme Court failed to follow applicable law on this issue.

B. Review Should Be Granted Because, If The Florida Supreme Court's Decision Is Allowed To Stand, Citizens Of Florida Would Be Treated Differently From Those In Other States In Violation Of Their Fourteenth Amendment Rights Under the Constitution

The Florida Supreme Court's decision cannot stand. The decision makes a mockery of this Court's decision in *Hayes v. Florida*, *supra*. Law enforcement could do whatever they pleased so long as they tell a person that they are not doing it.

In addition, citizens of the State of Florida would be treated differently than in any other state in this country. This cannot be permitted under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Florida Supreme Court cannot abridge the rights of its citizens as this Court has determined them to be. It cannot unilaterally alter the rights of citizens under the United States Constitution.

The purpose of the exclusionary rule is to prevent police misconduct. As this Court stated in *Elkins v. United States*, 364 U.S. 206, 217 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

The statement which has been misleadingly referred to by the courts and the police as a "confession" should have been suppressed. Not only would the correcting of this error by this Court at this time serve the purpose of the exclusionary rule in preventing further misconduct, it would also serve to instruct the lower courts of the proper standards to be applied in cases such as this.

II. Review Should Be Granted Because Standards Need To Be Set By This Court For Proper Use Of Confessions To Provide Lower Courts With Guidance And To Ensure Equal Protection Under The Law

What was called a confession, was erroneously admitted[4]. It was not a confession. It was, at best, a sarcastic statement made to stop the interrogation. The statement was allegedly made to law enforcement during his interrogation. However, it was not recorded, written down, or memorialized in any way. Law enforcement testified at the hearing on the motion to suppress this statement that no attempt was made to memorialize it once it was learned that the video taping equipment had ceased taping. Certainly, if law enforcement believed it was a confession, steps would have been taken to have the Petitioner write a statement to that effect, or to reload the video equipment. However, nothing was done.

There was nothing in the statement which could be deemed to be a confession. Mr. Simmons did not say he committed the crime. He did not say how he did it. No follow-up questions were asked by law enforcement to determine whether or not this was an actual confession or just a sarcastic statement. They simply officially arrested the Petitioner.

Court review cannot be dictated by a mere statement by law enforcement. To permit the standard of review to change based solely upon an uncorroborated statement by law enforcement, without any means for the defense to question the veracity of the statement, would result in a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This Petitioner should not have been treated any differently by the judicial system on such a questionable statement than any other defendant facing charges based solely upon circumstantial evidence.

The possibility for manipulation of the judicial process is immense. An officer or other witness could simply state that some innocuous comment was made by a defendant and the whole review process would be altered. This cannot be permitted. This is not simply a hypothetical due process and equal protection issue. It is evidenced in the case at bar. This Court has expressed its aversion to the type of

4. See Argument I, *supra*.

situation presented here in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). There, this Court set forth all of the ills associated with interrogations geared toward eliciting a confession.[5] The interrogation at issue here was not of the length involved in *Ashcraft*. However, it is unknown what transpired during the time of the interrogation, of whatever length it may have been. To use a statement derived therefrom to alter the manner in which a case is reviewed flies in the face of any due process considerations. It also permits the unequal application of judicial standards in contradiction of the equal protection provided to our citizens by the Equal Protection Clause of the United States Constitution. As the Court is *Ashcraft* stated: [6]

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. . . . So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

III. Review Should Be Granted Because Circumstantial Evidence Cases Are Being Inappropriately Tried And Reviewed On Appeal

A. The Standard For Review On Circumstantial Evidence Cases Must Be Applied Fairly And Equally To All Such Cases In Accordance With The Equal Protection Clause of the Fourteenth Amendment To The Constitution

The Florida Supreme Court has held that:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1984). Where the only proof of guilt is circumstantial, no matter how strongly

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5. The Court referenced IV Reports of National Committee on Law Observance and Enforcement (Wickersham Commission), U.S. Government Printing Office, 1931, Lawlessness in Law Enforcement. The Court looked to the problems involved in determining what had actually occurred in a secret interrogation where the suspect was held and continually questioned without the benefit of counsel, friends or family.

6. 322 U.S. at 155.

> the evidence may suggest guilt, a conviction cannot be sustained unless evidence is inconsistent with any reasonable hypothesis of innocence.

State v. Law, 559 So.2d 187 (Fla. 1989), *citing*, *McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Mayo v. State*, 71 So.2d 899 (Fla. 1954). The decision in this case held that the higher standard used for circumstantial evidence cases was not applicable in the instant case. The basis for this was that the alleged confession ("I must have did it") constituted direct evidence of the crime, thereby making the case one which was not circumstantial. The lower court relied upon *Pagan v. State*, 830 So.2d 792 (Fla. 2002).

Even if this "confession" were determined to be one, the innocuousness of the statement cannot indicate what crime he "must have" done. The lower court addresses all three charges—murder, kidnapping and sexual battery—as if one charge. The kidnapping charge was not even considered until added by an indictment over a year after the commencement of the case. It was added as an afterthought by the prosecution in an effort to bootstrap venue over the murder and sexual battery charges into the trial court in which the case was brought.[7] It was not charged by law enforcement, so any interrogation could not have included that charge. Therefore, any "confession" could not have been to that charge. There is nothing to indicate whether the statement, if made, was in response to questions concerning the murder or the sexual battery. The lower court simply ignores the fact that there were three (3) charges and instead lumps them into one charge. This is wholly improper and contrary to all relevant law.

B. Review Should Be Granted Because The Standard Of Review In Circumstantial Cases Was Inappropriately Applied In This Case Thereby Violating The Petitioner's Due Process Rights Under The Fourteenth Amendment To The Constitution

The Florida Supreme Court sets forth what it contends to be the evidence which substantiates the conviction in this case. A review of the "facts" upon which it relies demonstrates that the decision is not based upon the record.

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7. See Argument VIII, *infra*.

The lower court states that Mr. Rodriguez testified that Simmons was the last person seen with the victim. He could not possibly have known that. In fact, Mr. Rodriguez' mother, Ms. Vega, testified that she saw someone with the victim at the laundromat whose description did not match Mr. Simmons'. The court also states that witnesses saw the victim trying to escape Simmons' car. Only one witness "identified" the victim. No witness saw the Petitioner in the car. The lower court states that three (3) eyewitnesses identified the car they saw as a Chevrolet Corsica or Ford Taurus. There were only two (2) witnesses. Both specifically identified the vehicle as a Chevrolet Corsica. One of the witnesses even spelled "Corsica" for the officers. It was law enforcement who made it a "Corsica-type vehicle". The identifications were highly tainted.[8] The blood spatter in the Petitioner's vehicle consisted of a few minute drops and were mixed with canine DNA. This "spatter" is inconsistent with the massive injuries sustained by the victim. The blood stain on the passenger seat was highly degraded and a DNA profile could not be obtained from it.[9] The tire tracks which the lower court claims "matched" those of two of the tires on the Petitioner's vehicle were not matches, but were merely similar. The State's own expert testified that there were at least a million tires that would similarly "match". There was no connection which could be made by the State's experts to the tire tracks which were compared to the crime which was committed. In fact, the experts could not say that the tire tracks were made by one vehicle. They were simply tracks in the general vicinity as where the body was dumped. Tracks which were immediately next to the body were not examined. The lower court referenced the Petitioner's semen which was found in the vaginal

8. See Argument IV, *infra*.

9. The Florida Supreme Court failed to address the issue of mitochondrial DNA which was used by the prosecution in an attempt to make this stain relevant to the case at bar. The basis for the failure to address this issue was based upon counsel's failure to object to the expert and the evidence presented at trial. Counsel did object, which was pointed out in the motion for rehearing. This failure by the Florida Supreme Court to address this issue was one of the reasons for the motion which is currently pending before that court to issue a decision, as the decision here under review is contrary to the record. As stated *supra*, the Florida Supreme Court has yet to act on that motion for clarification and for issuance of an opinion on rehearing.

wash of the victim. Even the prosecutor at trial stated that that had no bearing on the crimes charged. The evidence was permitted in only to confirm that Mr. Simmons knew the victim. There was no physical evidence that that sexual encounter was not consensual. Certainly, the damage done to the victim's anus was not the result of consensual sex, but there was nothing connecting the Petitioner to the act which resulted in those injuries.

On the basis of the "facts" set forth above, the Florida Supreme Court concluded that there was sufficient evidence to find the Petitioner guilty of all three charges. Even if the lower court's "facts" were substantiated by the record, which they are not, there is nothing that ties the Petitioner to these crimes.

On the kidnapping charge, there was no evidence that the Petitioner forced the victim into the vehicle. There is no evidence that the Petitioner was in the vehicle. The witnesses' testimony is actually contrary to that finding. The driver was described as having dark hair when the Petitioner is blond. The woman seen was observed by both witnesses as wearing all white. The victim was found with black pants and a gray sweatshirt. If the victim was the person observed in the vehicle, she would have had to have changed clothes before being murdered, thereby negating the possibility of the kidnapping.

There is no evidence at all tying the Petitioner to the sexual battery or the murder. No forensic evidence made any connection to the Petitioner. Law enforcement limited its investigation to finding the Petitioner. Once found, law enforcement ceased its investigation. No crime scene was found, no murder weapons[10] were found. There was no evidence presented to indicate that Mr. Simmons had any reason whatsoever to commit these crimes. In fact, the only connection made between the two was a description of the Petitioner as the victim's "boyfriend" and that he had tried to help this woman who was by all accounts down on her luck.

The lower court cites *Thomas v. State*, 894 So.2d 126 (Fla. 2004), *cert. denied*, 544 U.S. 1003 (2005), to support its decision. In that case, the victim was seen being forcibly put in a vehicle by Thomas. Thomas admitted to the murder and pointed law enforcement to

10. Testimony of the medical examiner was that there could well have been more than one weapon used as the wounds were of various shapes and types.

evidence. Forensic evidence obtained from the victim contradicted Thomas' story that the sexual encounter had been consensual. Thomas' confession was initially given to law enforcement without the benefit of being taped. It was then repeated by Thomas on tape. He stated that he committed the murder after having harbored a grudge about a stolen vehicle for about one month. Thomas not only confessed but led law enforcement to the scene and to the murder weapon. This case is factually inapposite to the case at bar.

The difficulty with a circumstantial evidence case is that "circumstances" can lead to a variety of conclusions. It is, therefore, imperative that the judicial system take a hard look at such cases, particularly when the consequences are of the utmost importance as they are here—the courts are seeking to take the Petitioner's life. It is unthinkable that under any definition of due process that a court could rely upon questionable circumstances, let alone those unsupported by the record, to take a man's life. Yet that is precisely what the Florida Supreme Court has done. Its decision is contrary to every right conferred upon our citizens by the Constitution under the Fourteenth Amendment.

IV. Review Should Be Granted Because Out-Of-Court Identifications Were Improperly Admitted In This Case In Violation Of The Petitioner's Fourteenth Amendment Rights

The admissibility of out-of-court identifications which are the results of suggestive confrontation procedures has long been governed by this Court's decision in *Neil v. Biggers*, 409 U.S. 188 (1972). There is no question that the procedures used in the identification of the Petitioner's vehicle by two witnesses and the identification of the victim by one witness were unduly suggestive. This was conceded by the prosecutor, the trial court and the Florida Supreme Court. Therefore, the factors outlined in *Neil v. Biggers* must be considered to determine the likelihood of misidentification. Those factors are:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. at 199-200. The Florida Supreme Court ostensibly reviewed these criteria in determining that the identifications were properly admitted. However, only some factors were considered, and the record was not accurately represented in this analysis.

The lower court stated that the out-of-court identifications by Ms. Renfro were admissible because she had "an abundance of time and good lighting conditions to view the victim and the car". This is not consistent with the record.[11] The Florida court also found that the descriptions initially given were so close to the actual vehicle and the victim as to validate the identification. This is not supported by the record.[12]

Similarly, the identification of Mr. Montz was found to be reliable, although the procedure was highly suggestive, *i.e.*, a video of one vehicle, and he did not see the video for over a year after he initially saw the vehicle. The particulars noted by the Florida Supreme Court to make his identification not susceptible to being incorrect were things which he saw on the video which were not on the vehicle at the time he initially observed it.[13] It is also worth noting that Mr. Montz saw a woman at the open car door. While he stated he could not identify her, he did say she was wearing all white.

The Florida Supreme Court did not adequately review the record to reach its conclusion but instead simply found indicia to permit

11. The car was seen at night. It slowed but did not stop for a stop light. It sped up almost immediately upon approaching the light. The car door was opened for an extremely brief time which was the only time the victim was allegedly seen. The lighting came from a gas station diagonally across the intersection. The lighting was insufficient to see the driver of the vehicle. During this time, she had a discussion with the person she was with and went to her own vehicle to follow the car. This cannot constitute an "abundant" amount of time.

12. She stated unequivocally at the time she saw the vehicle that it was a Corsica. It was not until she saw the Petitioner's vehicle that she was unsure of the make. It was also not until she saw the vehicle that she remembered the flag. The patriotic sticker was on the opposite side of the car from where she was standing. She testified that she could not see even the license plate, let alone something in the back window. She also stated that the victim was wearing white and had short brown hair. The "pinned up" part of the hair description was not made until after speaking with the officers. The victim was not wearing white.

13. The spoked rims were on replacement tires put there by law enforcement when the Petitioner's tires were sent to the laboratory for testing, the dirt was primarily fingerprinting matter put there by law enforcement, and the two dents were not seen by him on an actual photograph of the Petitioner's car. It can only be assumed that the "dents" were a result of the lighting on the video.

their upholding the trial court's ruling. This is not the proper role of the reviewing court. The fact that the trial court and the Florida Supreme Court failed to account for very significant discrepancies from the initial descriptions and failed to fully evaluate the *Biggers* criteria violated the Petitioner's due process rights under the Fourteenth Amendment.

V. Review Should Be Granted Because The Issue Of The Use Of Expert Testimony On Eyewitness Issues Requires This Court To Set Standards For Its Use As The State Courts And The Federal Circuit Courts Are Split Resulting In Unequal Protection Under The Law

The Petitioner challenged the trial court's exclusion of the defense expert witness on eye witness testimony on direct appeal. The Florida Supreme Court's decision simply states that the trial court did not abuse its discretion in excluding this witness, *citing Johnson v. State*, 438 So.2d 774 (Fla. 1983). However, the issue prompted three (3) concurring opinions, one of which was joined by two (2) of the remaining justices. Only one of the concurrences agreed with the decision of the Court. Thus, a majority of the justices were uncomfortable with this section of the decision.

Then Chief Justice Pariente's concurrence recognizes that, since *Johnson* was decided, research and practical experience has proven that the belief that eyewitness testimony can be adequately assessed by jurors is incorrect. She cites to cases which have held that it is an abuse of discretion to deny the admission of expert testimony[14] and studies which demonstrate that eyewitness testimony is anything but reliable.[15]

Courts throughout the country have been wrestling with the problem of the fallibility of eyewitness testimony and have come to varying solutions. Some state courts, in addition to the Federal courts mentioned above, have found it to be an abuse of discretion to preclude the defense from having expert testimony concerning eyewitness testimony. *See, e.g., People v. McDonald*, 37 Cal.3d

14. *United States v. Mathis*, 264 F.3d 321 (3rd. Cir. 2001); *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000).

15. Elizabeth Loftus & James Doyle, *Eyewitness Testimony: Civil and Criminal* §3-12 (3d Ed. 1997); Gary L. Wells, *Eyewitness Identifications: Scientific Status in Science In the Law: Social and Behavioral Science Issues* (David L. Faigman et al. eds., 2002).

351, 690 P.2d 709 (1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991); *State v. Maestas*, 2002 Ut 123, 63 P.3d 621 (2002); *State v. Palmer*, 715 N.W.2d 767 (Iowa App. 2006). Some states have determined that a jury instruction is appropriate. *See, e.g., State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (Kan. 1981); *State v. Cromedy*, 158 N.J. 112 (1999). Others have found that it is not an abuse of discretion to fail to permit the testimony of an eyewitness expert. *See, e.g., Commonwealth v. Santoli*, 424 Mass. 837, 680 N.E.2d 1116 (1997); *People v. Tisdel*, 316 Ill.App.3d 1143, 739 N.E.2d 31 (2000) (holding that it would not have been an abuse of discretion if the trial court had permitted the eyewitness expert to testify); *Weatherred v. State*, 15 S.W.3d 540 (Tex.Cr.App. 2000); *State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002). The circuit courts, too, are divided.[16]

This Court has long recognized the problems inherent in cases involving eyewitness testimony. In *United States v. Wade*, 388 U.S. 218 (1967), the Court found that "the annals of criminal law are

16. *United States v. Butler*, 636 F.2d 727 (D.C. Cir. 1980) (requires a trial court to evaluate the probability of misidentification and, if sent to the jury, gives a jury instruction tailored to the facts of the case); *United States v. Stokes*, 388 F.3d 21 (1st Cir. 2004) (expert permissible under unspecified circumstances); *United States v. Lumpkin*, 192 F.3d 280 (2nd Cir. 1999) (applies a "manifestly erroneous" standard of review and generally disfavors eyewitness experts as interfering with the province of the jury); *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006) (experts assist because jurors are unaware of the unreliability of eyewitness identifications and studies have shown the misidentification problem is great); *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993) (realizing trend toward the acceptance of experts while holding that this case did not require one and noting differences in decisions among the states and circuits); *United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987) (expert testimony should have been permitted on photographic evidence but stating that general reliability expert testimony would overburden the judicial system); *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001) (outlining the circuit's general acceptance of psychological studies as scientifically sound and the proper subject of expert testimony in appropriate cases); *United States v. Carter*, 410 F.3d 942 (7th Cir. 2005) (no abuse of discretion in not permitting expert testimony with appropriate jury instruction and expressing concerning about interference with the province of the jury); *United States v. Martin*, 391 F.3d 949 (8th Cir. 2004) (generally favoring excluding experts unless the eyewitness testimony is wholly uncorroborated); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994) (does not adopt a per se exclusion of expert testimony but favors a jury instruction); *United States v. Rodriguez-Felix*, 450 F.2d 1117 (10th Cir. 2006) (recognizing that expert testimony may be more effective than

rife with instances of mistaken identification". The Court referenced Justice Frankfurter's oft-cited statement in *The Case of Sacco and Vanzetti* 30 (1927) who stated:

> What is the worth of identification testimony when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.

Since this Court's decision in *Wade*, this dilemna of eyewitness testimony which has been proven to be wrong has been studied by many scholars in the field of psychology. It has been determined that the identifications have been tainted by many factors which are counterintuitive to the normal juror. A large percentage of the convictions which have been overturned based upon DNA evidence have had eyewitnesses who were simply wrong.[17]

As this Court stated in *Patterson v. Alabama*, 294 U.S.600, 607 (1935):

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

The large number of studies conducted on this subject, and the universal acceptance of the fact that eyewitness testimony accounts for far too many wrongful convictions, provides just such changes which must precipitate a change for justice to be served. As the Supreme Court of New Jersey aptly pointed out in *Cromedy, supra*, the arguments in favor of a clarification of the law on this matter are not dissimilar from what precipitated this Court's landmark decision

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cross examination to rebut eyewitness testimony but finding the expert was not required given the facts of the case); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997) (generally unfavorable to the admission of such expert testimony and stating that the court is without authority to change that absent an en banc decision or a Supreme Court decision to the contrary).

17. Of the first 130 DNA exonerations, the Innocence Project reports that 101 had false identifications. That is nearly 78 percent of the cases. This and other statistics can be found at *www.innocenceproject.org/causes/index.php*.

in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). In that case, the Court used studies conducted in the behavioral and social sciences to support legal conclusions and to make needed changes in the law of the land. This was done to avoid the severe injustices which were occurring.

There can be no greater injustice than wrongful convictions resulting in the taking of one's liberty, and perhaps even life, as could be the result in the instant case. There can be no greater violation of one's constitutional rights.

VI. Review Should Be Granted Because The Defendant Was Wrongfully Denied The Opportunity To Call An Expert On Eyewitness Testimony In Violation Of His Due Process Rights Under The Fourteenth Amendment To The United States Constitution

Even if the Court should determine that it does not wish to generally review the issue of the propriety of expert testimony on eyewitness identifications, the facts of this case require this Court's review.

In the case at bar, the identifications were suspect at best under the criteria set forth by this Court in *Neil v. Biggers*, 409 U.S. 188 (1972). This was discussed more fully *supra*. Briefly, the only identifications at issue in this case are two (2) witnesses who saw a vehicle, one of whom allegedly saw the victim in that vehicle. The vehicle was seen by both individuals, who were unrelated and were at the same location but not together, at night. As to the vehicle, both described a white Chevrolet Corsica as the car they observed. The Petitioner had a white Ford Taurus. The one witness, Ms. Renfro, was shown the Petitioner's vehicle, and it alone, in the sallie port of the Lake County Sheriff's Office. She identified the vehicle as being the one in which she allegedly saw the victim several nights earlier. She testified that she had seen the vehicle from the passenger's side, but identified the vehicle by a bumper sticker in the rear window on the driver's side. The Petitioner's vehicle had an American flag attached to the passenger window which was not mentioned by either witness at the time.

The second witness, Mr. Montz, a long-time acquaintance of the prosecutor who was his boy scout troop leader, identified the vehicle over a year later. He too was shown only one vehicle. He identified

the car by the spoked wheels (which had been placed on the car by law enforcement after the original tires had been removed for testing), by the dirt on the car (which was fingerprint material put there by law enforcement), and by the dent on the car (which was not on the vehicle). He then remembered the flag.

As to the individual seen in the vehicle, both identified her as wearing all white, although her body was found with black pants and a gray sweatshirt. Only Ms. Renfro claims to have seen the woman's face. She initially described the woman as being old and having short, brown hair. She was shown a single photograph of the victim (which was not a current photograph) and was positive that was the woman she had seen. The victim was 48 years old and had long black hair.

The only other identification made was of the Petitioner by Mr. Rodriguez who said that he saw the Petitioner talking with the victim in the laundromat at approximately 10:30 pm on Saturday night.[18] He had met the Petitioner previously. Mr. Rodriguez' mother, Ms. Vega, saw the victim in the laundromat at the same time but described the person speaking with her as an older man with salt and pepper hair, not the young, blond man that is the Petitioner.

The trial court determined, and the Florida Supreme Court agreed, that these identifications met the standards set forth under the *Neil v. Biggers* case. While the Petitioner contends they do not, the suggestive manner in which the identifications were obtained, the disparity between the initial statements of the witnesses and their later identifications, and the fact that there was no evidence tying the Petitioner to the crimes alleged are more than sufficient grounds to have required the trial court to permit the eyewitness expert's testimony.

Even the cases in which appellate courts have held that the trial court did not abuse their discretion in not permitting such expert testimony have stated that discretion should be exercised to permit this testimony in cases such as this. The court in *Santoli* stated that "[i]t is significant, in deciding the principal issue on appeal, that the Commonwealth's case was not built solely on the eyewitness

18. The victim's body was found on Monday morning. The day and time of death was undetermined.

testimony of the victim."[19] The court there went on to state that, while there has been little guidance from appellate courts on this matter, some courts have stated that experts could be properly excluded only if there were some evidence corroborating the eyewitness identification. In the instant case, there is none.

Similarly, in *Tisdel*, the court held that the trial court did not abuse its discretion in precluding the expert testimony, but did state that the case provided facts in which the expert could have assisted the jury in reaching a correct decision. The factors to which that court looked were the amount of time between the crime and the identifications and the fact that there was no corroborating evidence linking the defendant to the crime.[20]

The Florida Supreme Court's decision in this case establishes the fact that the identification testimony of the witnesses was virtually the entirety of the State's case. It is all evidence relating to the kidnapping charge. There was no evidence linking the Petitioner to the crimes of sexual battery or murder.

The fact that the identifications were permitted in the first instance was incorrect, an error which was compounded by the trial court in failing to permit the eyewitness expert to testify. The Florida Supreme Court's decision is a furtherance of the injustice.

The fact that the justices' additional opinions were concurrences and not dissents speaks to the need for this Court to review this issue. The state courts are following their precedents without any more than lip service to the numerous overturned convictions and studies on this issue. Without a review by this Court, the number of wrongful convictions based upon faulty eyewitness testimony can only continue to rise.

The Petitioner in this case has received a sentence of death and is currently sitting on death row as a result of these identifications. There is no definition of justice which can permit this to continue.

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19. 424 Mass. at 839.

20. 316 Ill.App.3d at 1158.

VII. Review Should Be Granted Because The Florida Supreme Court Misapplied The Law In Upholding The Trial Court's Ruling On the Suppression Of Evidence Which Was The Result Of An Improvident Granting Of A Search Warrant In Violation Of The Petitioner's Rights Under The Fourth Amendment To The Constitution

The Florida Supreme Court glossed over the numerous inaccuracies in the affidavit for the search warrant of the Petitioner's vehicle. It concluded that there was no error in the trial court's admission of the evidence obtained from the vehicle, nominal as it was, "considering the totality of the circumstances". The review of an affidavit of a search warrant has nothing to do with the "totality of the circumstances".

This aspect of the case is governed by *Franks v. Delaware*, 438 U.S. 154 (1978). There, this Court held that any information contained in an affidavit for a search warrant which is false or intentionally misleading must be removed, and the remainder of the affidavit reviewed to determine if probable cause existed for the search warrant absent the false or intentionally misleading information.

Here, the affiant was Detective Brewer, who was also the legal advisor to the Lake County Sheriff's Office. The Florida Supreme Court concedes that the affiant's qualifications as a law enforcement officer were overblown at best. The lower court states that it was not "false" so it seems to be all right. Certainly, beginning an affidavit with misleading information on one's own qualifications must give one pause as to the accuracy of the remaining information provided.

The information upon which the affidavit relies from Ms. Renfro was severely misleading. Law enforcement knew that Ms. Renfro had identified the vehicle as a Chevrolet Corsica, not a "Corsica-type" car. They knew her description of the woman she saw did not match the description of the victim. These are more than "slight variations" which is the characterization given to them by the Florida Supreme Court.

There were also "discrepancies" as to when the affidavit was signed and, therefore, what the affiant had actually observed. During the course of the hearing on the motion to suppress, Detective Brewer conceded that he misstated the location of the vehicle at the time

of the signing of the affidavit as being at the Petitioner's parents' home. However, the testimony from the tow truck operator makes this perhaps the one truthful statement. Detective Brewer testified that he did not go to the parents' home, thereby making it impossible for him to have actually observed anything about the car at the time of the signing of the affidavit.

The affidavit states that there was a blood-stained sheet observed in the back of the vehicle. Upon examination of that sheet, the trial judge could find no blood, no stains, or anything which could look like blood. Nevertheless, the Florida Supreme Court states that "the record does not refute Detective Brewer's testimony that he personally observed blood stains prior to preparing the warrant". This is quite remarkable, as the only droplets of blood found were on the door jamb which could not have been observed without opening the door of the vehicle. They were minuscule in any event.

The Florida Supreme Court seems to give credence to the "bloody blue sheet" not being bloody based on the "circumstances of the observation". According to Detective Brewer, the vehicle was in the sallie port of the Lake County Sheriff's Office.[21] It is hoped that one can adequately observe in this location. If not, appropriate light sources would have been available so as not to mislead a magistrate in the application for a search warrant.

The Florida Supreme Court cites the trial court's order on the motion to suppress in concluding that the lack of blood was irrelevant to a determination on the validity of the search. The trial court cited this Court's case of *Chambers v. Maroney*, 399 U.S. 42 (1970), to support its conclusion. That case is wholly inapposite here. As this Court is well aware, that case involved a warrantless search of a vehicle as the result of a traffic stop. This vehicle was parked at the Petitioner's parents' home. There were no exigent circumstances requiring seizure of the vehicle.

To permit this decision to stand would be to improvidently expand this Court's holding in *Chambers*. Under this case, there would be no reason for a search warrant ever to be obtained for any vehicle. The auto exception to the search warrant requirement of the Fourth Amendment would apply whether a vehicle is moving,

21. The Lake County Sheriff's Office took it upon itself to seize the vehicle prior to obtaining the search warrant. This is improper and this argument goes to that action as well.

parked, abandoned, or anything else so long as it is a vehicle. What is missing in the Florida Supreme Court's decision is the need for probable cause under *Chambers*. The decision reads that *Chambers* permits a vehicle to be seized and searched – period. There was no probable cause argument as it related to this vehicle at all. This flies in the face of this Court's opinions and the Fourth Amendment rights afforded to all citizens.

VIII. Review Should Be Granted Because The Trial Court Lacked Venue Under The Federal And Florida State Constitutions And The Florida Supreme Court Decided This Issue Employing The Wrong Standard Of Review

The Florida Supreme Court found the Petitioner's argument concerning venue to be without merit because it held that "it is reasonable for a jury to infer that the crimes occurred in Lake County". This is the wrong standard to be applied.

The Sixth Amendment to the United States Constitution states, in pertinent part, that:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, *which district shall have been previously ascertained by law* . . .

The Constitution provides that this is a matter to be determined by the court as a matter of law prior to the commencement of the trial. This was not done in this case and the Florida Supreme Court used the wrong standard to reach its decision. This is in violation of the Petitioner's Sixth Amendment rights, as well as his rights under the Florida Constitution.[22]

IX. Review Should Be Granted Because The Judicial Process In This Case Constituted A Violation Of The Defendant's Due Process Rights Under The Fourteenth Amendment Which Has Resulted In A Wrongful Conviction Which Must Be Remedied

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22. The Florida Constitution, Art. I, Section 16, is virtually identical to the United States Constitution's venue provision. It has been codified in the Florida Statutes at Section 910.03.

This is a death penalty case. Such a case should cause everyone involved in the judicial process to give the utmost care to developing proper facts, carefully applying the law, and, most importantly, ensuring that the rights of the accused are protected. However, quite the opposite occurred in the instance case.

This case began with a failure by law enforcement to properly investigate this heinous murder, if in fact an investigation occurred at all. The body of a deceased woman was found. Once she was identified, the "investigation" involved finding a person who knew her and had been seen with her some time before she died—the Petitioner. Once found, the investigation ceased and "facts" and circumstances were manipulated to make it appear that the Petitioner was the murderer. This was despite the fact that there was no evidence connecting the Petitioner to the crime, no crime scene was found—or even seriously sought—and no murder weapons were retrieved. Law enforcement had no idea how, where or when the crime was committed but they had a suspect. That was enough.

This failure to investigate and the resulting false arrest of the Petitioner was bad enough. However, the judicial system perpetuated the already despicable situation by simply finding ways around the law to justify the unjustifiable actions of law enforcement. The results are demonstrated, in part, above. However, the issues discussed herein are but indicia of what occurred in the courts below.

The trial court's decisions, both pre-trial and during the trial, demonstrate its obvious bent toward justifying the actions of law enforcement and upholding the State's case. The Florida Supreme Court's decisions in this case demonstrates its proclivity to not disturb the trial court's rulings.

The trial court's rulings permitted the "facts" and the "evidence" to become moving targets. The hearings on the motions to suppress went on for four (4) days as law enforcement was permitted to change their testimony with impunity, with no consequences whatsoever.[23] When the law would require the trial court's finding that something

23. For example, the testimony initially was that Mr. Simmons was not handcuffed. That was changed because one of the officers had testified at deposition that he had been handcuffed.

was inappropriate or inadmissible,[24] the trial court merely adjusted the facts.[25] Creative, albeit improper, applications of the law were used.[26] These pre-trial rulings left the defense crippled from the outset.

The trial was a continuance of the pre-trial motion problems. The trial court permitted the testimony of "experts" by the State who were not experts. The State's entomologist expert was not a forensic entomologist expert. Yet, the trial court permitted someone who had studied flies to testify as to the time of death of the victim. The mitochondrial DNA "expert" did not qualify as an expert under standards set forth by the Florida Supreme Court in *Magaletti v. State*, 847 So.2d 523 (Fla. 2nd DCA 2003), *rev. denied*, 858 So.2d 331 (Fla. 2003).[27] Ms. Renfro was to be recalled by the defense but she did not appear. The trial court failed to take any action concerning this.

The errors of law and fact outlined above demonstrate the machinations which the legal system went through to convict an innocent man. Law enforcement had no idea what had occurred so they arrested a person who knew the victim. The trial court made justifications which did not exist for an investigation which was perfunctory at best. To get to this end, witnesses were permitted to commit perjury, with stories changing as the circumstances seemed to warrant. Even the charges against the Petitioner changed when the State was unable to counter the defense argument that the venue was improper. The trial court permitted this and participated in it.

This trial makes a mockery of the judicial process. It is impossible to defend against ever-changing facts and legal theories. It came down to the Petitioner having to prove himself innocent which is contrary to our system of justice. It was also an impossibility, as law enforcement had no idea who committed this murder. Certainly the Petitioner had none.

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24. *See, e.g.*, the discussions supra concerning the identifications, suppression of the so-called evidence from the vehicle, and admission of the so-called confession.

25. This can be seen in findings such as law enforcement had probable cause when law enforcement did not think so.

26. *See, e.g.*, discussions on *Hayes and Chambers*.

The Fourteenth Amendment to our Constitution guarantees every citizen the right to due process of law through a fair trial. This was anything but fair. This result was only exacerbated by the Florida Supreme Court's decision which basically rubber stamped the trial court's actions by even further twisting the "facts" beyond recognition and applying the law in a manner which would confound even first year law students.

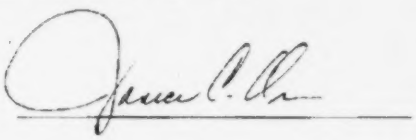
The legal issues discussed through this Petition are brought before this Court as they are the most egregious of the matters which occurred in the courts below. However, the most important aspect of this case which the Petitioner and the undersigned sincerely hope this Court will keep in mind is that an innocent man is sitting on death row because of sloppy police work and a judiciary which was bent on convicting some one. This cannot be permitted.

The number of wrongful convictions which have been proven in the recent past is an abomination. The errors which have resulted in these wrongful convictions are well known to this Court. Most all of them are present in this case. Unfortunately, not all cases have DNA which can exonerate the innocent. That does not mean that those individuals are any more deserving of remaining on death row until some other means of demonstrating their innocence is found. It is the courts which must ensure that this does not occur. The courts in this case fell woefully short.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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APPENDIX A
SUPREME COURT OF THE STATE OF FLORIDA

Supreme Court of Florida

No. SC04-19

ERIC SIMMONS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[May 11, 2006]

PER CURIAM.

We have on appeal a judgment of conviction of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder of Deborah Tressler, and a sentence of death for the murder conviction. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons stated herein, we affirm the convictions and sentence.

FACTS AND PROCEDURAL HISTORY

The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing and beating of Deborah

Tressler, who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious injury, and first degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively.[1]

Prosecution Evidence

The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene technician Theodore Cushing took pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain vehicle tracks were present closer to the body, but they appeared older and deteriorated.

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1. The sentence for sexual battery was to run consecutive to the sentence for kidnapping, and the sentence for kidnapping was to run consecutive to the sentence of death for first degree murder.

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face.[2] There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries

2. Lacerations occur due to an impact with a blunt force, as opposed to a cut from a sharp object, such as a knife.

to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy.[3] Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.[4]

After identifying the body as Tressler's, crime scene technicians went to the trailer where Tressler lived and the laundromat where she worked to conduct Luminol testing. They found Tressler's purse

3. This evidence included a vial of Tressler's blood, hairs from her hand, her clothing, insect larvae, and a sexual assault kit.

4. Dr. Hogsette explained that there are three larval instar stages, and the larvae taken from Tressler's body were in the first and second instar stage.

at the laundromat and located a birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light,

the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew Tressler from the laundromat, he often saw Simmons and Tressler together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with Tressler at the laundromat on the night of December 1, 2001. When he arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got Tressler's attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with

Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and Tressler were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it, but he was unable to identify any as Tressler's boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as Tressler's boyfriend.

Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a helicopter flying overhead. Simmons acknowledged that he knew Tressler was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object. Detectives Perdue and Adams

removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and video capabilities, although the videotape was allowed to run out after two hours.

Simmons waived his Miranda[5] rights and stated that he was friends with Tressler and had tried to help her improve her living conditions.[6] Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car[7]. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

5. Miranda v. Arizona, 384 U.S. 436 (1966).

6. Tressler lived in a trailer without plumbing behind the Oasis bar; she had to wash herself with a garden hose outside.

7. The detectives took turns leaving the room during the interview to check on the status of Simmons' car, which had been towed to the LCSO while detectives were interviewing Simmons. After the police obtained a search warrant, Detective Perdue watched the technicians perform a presumptive test on a suspected blood stain in the car, which indicated that it was blood.

Terrell Kingery, a crime lab analyst with the Florida Department of Law

Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger seat cushion, the carpet below the passenger seat in the front and back, and especially the area of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion, the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be

used to differentiate between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus. or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, Tressler's mother; determined that each had an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from three different areas, combined them into one sample, but

did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained a DNA profile that matched Tressler's. Mr. Johnson also matched Tressler's DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.

Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of Tressler's death from the insect specimens collected by the LCSO. He also could not determine whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.

Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the

State's lab did a search of the DNA bases only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.

Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.

At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment.[8]

Penalty Phase

During the penalty phase, the State presented victim impact evidence from a customer of the laundromat where Tressler worked and Tressler's father. The defense produced the probable cause affidavit involving Simmons' prior conviction in 1996 for aggravated assault with a deadly weapon against a law enforcement officer.

8. The grand jury indictment charged Simmons with murder in the first-degree due to the murder being from a premeditated design or while engaged in the felony of sexual battery. The jury simply found Simmons guilty of first-degree murder without differentiating between the two.

Defense counsel also called a corrections officer to testify regarding Simmons' behavior while he was incarcerated during the trial, and Simmons' sister to provide character evidence for Simmons.[9]

The jury unanimously returned an advisory verdict recommending a death sentence for the murder. The special interrogatory verdict form specifically indicated that the jury found unanimously that the State had proven three aggravating factors beyond a reasonable doubt: (1) Simmons was previously convicted of a felony involving the threat of violence to a person; (2) the crime for which Simmons was to be sentenced was committed during the commission of or attempt to commit sexual battery, kidnapping, or both; and (3) the crime for which Simmons was to be sentenced was heinous, atrocious, or cruel (HAC).

The trial court held a Spencer[10] hearing and heard testimony from Dr. Elizabeth McMahon, the defense's mental health expert. She testified that Simmons had a moderate-to-severe learning disability but no significant history of violence. Because the jury was not privy to these opinions, the trial court considered the jury's recommended sentence, but also independently weighed the

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9. These witnesses were Sergeant Craig Leslie and Ashley Simmons. Sergeant Leslie testified that Simmons had one incident of disciplinary confinement because he engaged in a fight with another inmate, which was not surprising to Sergeant Leslie considering Simmons' stay in jail of a year and nine months at that time. Ashley Simmons testified that Simmons came from a loving, close-knit family, and he was always helping other people, which "got him in the position he's in today."

10. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

evidence of aggravating and mitigating circumstances in determining Simmons' sentence. The trial court agreed with the jury's findings of the three aggravators, giving moderate weight to the prior felony conviction aggravator and great weight to the other two. The court rejected the defense's proposed statutory mitigating circumstance of Simmons' age of twenty-seven because there was no evidence that he functioned at a level below his age in anything but reading. The court also rejected all other statutory mitigating factors, but found a number of nonstatutory mitigating factors: (1) Simmons manifested appropriate courtroom behavior (some weight); (2) Simmons was kind to the victim (some weight); (3) Simmons loves and cares for animals (minimal weight); (4) Simmons was active in his church and a mentor to boys who belonged to the church's Royal Rangers (some weight); (5) Simmons had a good family background and came from a closely knit, caring family (some weight); (6) Simmons was employed (some weight); (7) Simmons has a learning disability (some weight); and (8) Simmons is immature (some weight). The trial court rejected three other proposed mitigating circumstances as either not proven or not mitigating in nature, and imposed the death penalty for the murder.[11]

11. The mitigating circumstances rejected by the trial court were: (1) Simmons' manifestation of appropriate behavior while at the jail (not proven); (2) residual or lingering doubt that Simmons is guilty and that Simmons' behavior is inconsistent with the psychological profile of a murderer (not proven and not admissible to prove innocence because it is inadmissible to prove guilt); and (3) the prosecution of Simmons was partially predicated upon circumstantial evidence (not mitigating).

ISSUES ON APPEAL

On appeal, Simmons raises eleven issues: (1) the guilty verdicts on the charges of kidnapping, sexual battery, and murder are not supported by the evidence; (2) the trial court did not have jurisdiction and venue was not proper in Lake County; (3) the trial court erred in denying Simmons' motion to suppress his statement to law enforcement officers and evidence obtained from the search of his vehicle; (4) the trial court erred in allowing the State's expert on mtDNA to testify before the jury; (5) the prosecuting attorney made improper remarks regarding the mtDNA evidence; (6) the trial court erred in excluding the testimony of a defense expert in eyewitness identification; (7) the trial court erred in allowing the State's entomology expert to testily as an expert in the life cycle of flies; (8) the trial court erred in denying Simmons' motion to exclude an in-court identification of Simmons' vehicle; (9) the prosecutor engaged in misconduct that rose to the level of preventing a fair trial; (10) Florida's death penalty statute is unconstitutional; and (11) the trial court erred in imposing aggravators to arrive at the death sentence. We address each of these issues.[12] In addition, although not raised

12. We find that Simmons' claim that the State's witness on mtDNA testing was not qualified to testify is waived because defense counsel failed to object to his qualifications at trial. See Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court."). We also find that Simmons' claim that the prosecutor made improper remarks concerning the mtDNA evidence on Simmons' car seat is waived because Simmons' counsel did not properly brief this issue for appeal. See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal

by Simmons, we have reviewed the record and conclude that, in light of the totality of the circumstances, Simmons' death sentence is proportionate when compared to the facts of other death penalty cases.

I. Sufficiency of the Evidence

In Simmons' first issue on appeal, he contends that the evidence against him is not sufficient to support the trial court's guilty verdicts on the charges of kidnapping, sexual battery, and first-degree murder. "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001) (citing Banks v. State, 732 So. 2d 1065, 1067 n.5 (Fla. 1999)).

In this case, there was physical evidence and eyewitness testimony, as well as Simmons' statements, linking Simmons to Tressler at the time of the murder. We agree with the State that the jury, as the

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"constitutes a waiver of these claims"); see also Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues; and these claims are deemed to have been waived."). Likewise, we conclude that Simmons' argument that the prosecutor engaged in misconduct that rose to the level of preventing a fair trial is waived because of its vagueness.13. The State correctly points out in its brief that Simmons' counsel adopts arguments made in the court below in her initial brief to this Court. This practice does not preserve an issue for review by an appellate court. See Duest, 555 So. 2d at 852 (stating that claims are deemed waived if a party merely makes reference to arguments made in a lower court).

trier of fact, was entitled to draw an inference that Simmons was acknowledging guilt from his statement that he "must have did it." Therefore, this case is not entirely circumstantial. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002) (stating that when the evidence in a case is "both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases"). A confession constitutes direct evidence of guilt. Floyd v. State, 850 So. 2d 383, 406 (Fla. 2002) (citing Walls v. State, 641 So. 2d 381, 390 (Fla. 1994)).

Further, Mr. Rodriguez testified that Simmons was the last person seen with Tressler in the laundromat on the evening of December 1, 2001. Eyewitnesses then saw Tressler trying to escape Simmons' car and screaming for help at the intersection of State Road 44 and County Road 437. Three eyewitnesses identified the car they saw on the night of December 1, 2001, as resembling a Chevrolet Corsica or Ford Taurus and possessing characteristics matching Simmons' car. There was blood spatter in Simmons' car and a large, degraded blood stain on the passenger seat. Tire track impressions taken from the area near where Tressler's body was discovered matched the two rear tires of Simmons' car, which were two different tire models. Simmons' semen was found in Tressler's vaginal washings. Dr. Gulino testified that Tressler's autopsy revealed extensive injuries to her anus not consistent with consensual anal sex. In light of

these facts and circumstances, we conclude that there is sufficient evidence to find Simmons guilty of kidnapping, sexual battery, and first-degree murder. See Thomas v. State, 894 So. 2d 126, 131-32, 134-35 (Fla. 2004) (holding that a combination of direct eyewitness testimony, the defendant's confession, and circumstantial evidence that defendant continued to confine victim while intending to inflict harm because she was eventually sexually assaulted and murdered supported a conviction of kidnapping and first degree murder), cert. denied, 125 S. Ct. 1939 (2005).

II. Jurisdiction and Venue

In his next issue on appeal, Simmons argues that the trial court erred in determining that it had jurisdiction to try Simmons because the State admitted it had no knowledge of exactly where the crimes occurred. In contrast, the State points out that jurisdiction is distinct from venue, and a circuit court has jurisdiction to adjudicate a first-degree murder case. Further, the State notes that venue is sufficiently proven if the jury can reasonably infer from the evidence that the crime occurred in the county where the trial occurs.[13]

The circuit courts have exclusive original jurisdiction over all felonies. Art. V, § 5(b), Fla. Const.; § 26.012(2)(d), Fla. Stat. (2003). A person can be prosecuted in this state for a crime if the offense is committed either wholly or partly within this state. § 910.005(1)(a), Fla. Stat. (2003). Because a circuit court has original jurisdiction

over felonies, including murder, we find that the trial court properly denied Simmons' motion to dismiss for lack of jurisdiction.

As to venue:

> Venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient.

Lowman v. State, 85 So. 166, 167 (Fla. 1920). In this case, it could reasonably be inferred that the felonies were committed in Lake County. The evidence in the trial court tended to show that eyewitnesses observed Tressler in Simmons' car screaming for help in Lake County on the night of December 1, 2001. Tressler's body was discovered in Lake County on the morning of December 3, 2001. While it is possible that the murder and sexual battery could have occurred in a different county, it is reasonable for a jury to infer that the crimes occurred in Lake County.

III. Simmons' Motion to Suppress Statements and Vehicle Evidence

Simmons argues that the trial court erred in refusing to suppress the statements he made to police because he did not voluntarily accompany authorities to the police station. Simmons also argues that

the trial court improperly denied his motion to suppress the evidence law enforcement officers obtained from his vehicle. This Court has stated that "a suppression ruling comes to the reviewing court clad in a presumption of correctness as to all fact-based issues." State v. Glatzmayer, 789 So. 2d 297, 301 (Fla. 2001). Given the evidence before the trial court, we find no error.

A. Simmons' Statements

The trial judge denied Simmons' motion to suppress, determining that Simmons voluntarily submitted to the interrogation and, in the alternative, that the detectives had probable cause to detain Simmons for a custodial interrogation.

1. Voluntariness of the Interrogation

Simmons contends that, given the number of officers that surrounded his parents' Pine Lakes residence on December 7, 2001, a reasonable person in his position would not feel that he or she could decline the detectives' invitation to come to the sheriff's office. Further, Simmons contends that the fact that he was handcuffed and transported in the back of a caged, marked police cruiser belies the contention that he went voluntarily.

In support of his argument, Simmons cites to Hayes v. Florida, 470 U.S. 811 (1985). In Hayes, police approached a burglary-rape suspect on his front porch and asked him to come to the police station for fingerprinting. Id. at 812. An investigator threatened to arrest

the suspect if he did not comply. Id. The United States Supreme Court determined that Hayes' detention was not consensual, and it reversed the conviction and remanded the case because the police did not have probable cause to detain the suspect. Id. at 814, 817-18.

Unlike the defendant in Hayes, the uncontroverted testimony by the officers in this case indicates that Simmons never expressed any reluctance to accompany the detectives to the sheriff's office. The officers did not threaten Simmons with an arrest or try to coerce him in any way. These crucial factual differences distinguish Hayes from the present case.

Although Simmons contends that a "thundering herd" of police officers would render any reasonable person unable to refuse the detectives' invitation, the record shows that most of these officers were not directly involved in any confrontation with Simmons or the conversation between Simmons, Detective Adams, and Detective Purdue. These two detectives were not in uniform and were not armed when they conducted the initial interview at Simmons' parents' home. Moreover, although Simmons was handcuffed and transported in the back of a caged police cruiser, the State presented evidence that these measures were taken for the safety of the police officers involved and that police removed the handcuffs as soon as Simmons reached the sheriff's office. Nothing in the record indicates that Simmons objected to being handcuffed or at any time expressed

a desire to terminate the encounter. Our recognition of the propriety of using handcuffs in noncustodial encounters with police is in line with this Court's prior case law. See, e.g., Taylor v. State, 855 So. 2d 1, 18 (Fla. 2003) (holding that the use of handcuffs during a trip from a police cruiser to an interrogation room did not render a detention custodial when the suspect was told that he was not under arrest). Under the totality of the circumstances, we find no error in the trial court's determination that a reasonable person in Simmons' position would have felt free to terminate the encounter with police.

Simmons does not deny that he signed a Miranda waiver before the detectives began to interview him at the sheriff's office, and he never asked to terminate the interview. The two detectives allowed Simmons to use the bathroom when he needed to, and the three even ate dinner together. Moreover, the detectives told Simmons that they would provide a ride home if his family could not come to get him, and they reassured Simmons that he was not under arrest.

Given the significant deference that we give to trial courts' fact-finding on motions to suppress, we conclude that the trial court did not abuse its discretion when it accepted the evidence presented by the State and determined that Simmons' December 7 interview with detectives was voluntary under the totality of the circumstances.

2. Probable Cause

Even if Simmons was able to successfully argue that his detention was custodial and not voluntary, he would still have to show that the

police detained him without probable cause in order to prevail. See Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984) (holding that the trial court properly denied defendant's motion to suppress evidence when there was probable cause to support his de facto arrest). In addition to finding that Simmons' encounter with detectives was voluntary, the trial court determined that the police had probable cause to detain Simmons.

We have stated that "[p]robable cause for arrest exists where an officer 'has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction.'" Chavez v. State, 832 So. 2d 730, 747 (Fla. 2002) (quoting Walker v. State, 707 So. 2d 300, 312 (Fla. 1997)). At the time of the interview, detectives had statements from Simmons' friends and acquaintances that indicated that he was Tressler's boyfriend and that he was the last person seen with Tressler while she was alive. They also had a statement from Mr. Rodriguez that he saw Simmons with Tressler between 10:30 p.m. and 10:45 p.m. on December 1, 2001. Moreover, Simmons' car matched the description of the car that two witnesses saw at about midnight on December 1, from which a woman matching the description of Tressler was attempting to flee. Detectives also had statements from witnesses that Simmons may have beaten Tressler earlier in the week, and they knew that he had previously been arrested for abusing a prior spouse or girlfriend.

This Court has stated that "[t]he existence of probable cause is not susceptible to formulaic determination. Rather, it is the 'probability, and not a prima facie showing, of criminal activity [that] is the standard of probable cause.'" Doorbal v. State, 837 So. 2d 940, 952-53 (Fla. 2003) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)). Considering the totality of the circumstances and the evidence presented in this case, we cannot say that the trial court abused its discretion when it found that any custodial detention of Simmons was supported by probable cause.

B. Evidence from Simmons' Vehicle

Simmons also challenges the trial court's denial of his motion to suppress evidence seized from his vehicle on December 7, 2001, under a search warrant. Simmons alleges that factual inaccuracies plague the affidavit that supported the magistrate's decision to grant the search warrant. Simmons alleges that, after excising those portions of the affidavit that are inaccurate, the State is left with nothing upon which the magistrate could have found probable cause to authorize a search.

Deliberate falsity or reckless disregard for the truth in an affidavit that gives rise to a search warrant can, in some instances, lead to suppression of evidence obtained under that warrant. See Franks v. Delaware, 438 U.S. 154, 171-72 (1978). However, we have held that an erroneous statement will only invalidate a search warrant if, after

excising the erroneous statement, the remaining true statements are insufficient to establish probable cause. See Terry v. State, 668 So. 2d 954, 958 (Fla. 1996). In the instant case, the trial court ruled that there were, in fact, no intentionally or recklessly false statements.

First, Simmons alleges that the affidavit provides an inaccurate description of Detective Brewer's qualifications by stating that Detective Brewer had been a law enforcement officer since 1979 because Detective Brewer's certification lapsed for twenty years while he pursued a career as an attorney. The record, however, indicates that Detective Brewer was a sworn officer at the time that he signed the affidavit and that his experience as an officer dated back to 1979. Further, although Detective Brewer's Florida certification did lapse during the 1980s, his certification as a military police officer continued during this period and never lapsed. Given this evidence, we conclude the trial court did not err in concluding that the portion of the affidavit regarding Detective Brewer's qualifications was not false.

Next, Simmons alleges that the affidavit misstates the information that detectives obtained from Ms. Renfro. Detective Brewer's affidavit indicates that a witness observed a woman who matched the description of the victim and was screaming and attempting to flee a white Chevrolet Corsica-type car. Simmons cites to Ms. Renfro's statement to the police, which indicated that the woman

that Ms. Renfro saw was in her mid-fifties, had short brown hair, and was wearing a white T-shirt. Because Tressler was actually forty-eight, had long black hair, and was wearing a grey shirt, Simmons argues that Ms. Renfro's description did not match the description of Tressler and that the affidavit is materially false.

However, as the trial court properly noted, Detective Purdue testified that Ms. Renfro positively identified Tressler's picture as the same woman she saw in the car. Therefore, despite the slight variations Simmons notes between Ms. Renfro's description and Tressler's actual appearance, the trial court properly concluded that the portion of the affidavit regarding Ms. Renfro's description of Tressler was not misstated.

Next, Simmons alleges an inaccuracy in the portion of the affidavit that indicates that Detective Brewer personally observed several visible stains consistent with dried blood in the back of Simmons' vehicle. This is because the trial judge personally examined the sheet and found no blood. While there does appear to be an inconsistency between Detective Brewer's and the trial judge's observations of the sheet, the record does not refute Detective Brewer's testimony that he personally observed blood stains prior to preparing the warrant. The trial court found that the officer's observations and conclusions were not unreasonable considering the circumstances of the observations.

The trial court also noted that "[t]he observation of the blood-stained sheet may be superfluous under Chambers v. Maroney, 399 U.S. 42 (1970), because "the initial Fourth Amendment intrusion was the seizure of the vehicle, and a proper analysis would be to review of [sic] the facts as they existed at that time." In Chambers, the United States Supreme Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

399 U.S. at 52. We find no error in the rulings of the trial court.

Simmons further alleges that the testimony as to when Detective Brewer signed the affidavit and when the magistrate issued the search warrant indicates that Detective Brewer never saw the vehicle before signing the affidavit. The trial court acknowledged that although there was "some question as to when the affidavit and warrant were presented to the magistrate," the trial court did "not find the discrepancy in time [to be] any indication of untoward action on behalf of the Lake County [] Sheriff's Department." Considering the totality of the circumstances and the deference we give to the trial court regarding factual determinations, we find no error. Based on the analysis concerning Simmons' statements and the search of his vehicle, we also find no merit to Simmons' contention that the arrest of Simmons was the result of police misconduct.

IV. Testimony of Defense Expert in Eyewitness Identification

In his next issue on appeal, Simmons argues that the trial court erred in refusing to admit Dr. John Brigham's expert testimony concerning the psychological factors that contribute to erroneous witness identifications when law enforcement officers use suggestive techniques.

In Johnson v. State, 438 So. 2d 774 (Fla. 1983), this Court found no error in a trial court's refusal to allow such expert testimony:

> A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L. Ed. 2d 1322 (1982); Johnson v. State, 393 So. 2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981). Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.

Id. at 777 (citation omitted). Subsequently, in McMullen v. State, 714 So. 2d 368 (Fla. 1998), this Court considered whether the same expert witness, Dr. Brigham, was improperly excluded as a witness when offering similar testimony. This Court concluded "that the admission of such testimony is within the discretion of the trial judge and that . . . the trial judge did not abuse that discretionary authority by refusing to allow the introduction of the

expert testimony." Id. at 369. This Court stated in McMullen that Florida follows the "discretionary" view articulated in Johnson regarding the admissibility of expert witness testimony concerning the reliability of eyewitness testimony. at Id. 370-71. Dr. Brigham stated in his proffered testimony in the present case that he would testify at trial to issues similar to those in McMullen. Under our case law we conclude the trial judge did not abuse his discretion in disallowing Dr. Brigham's testimony.

V. State's Entomology Expert

Simmons next argues that because Dr. Hogsette, the State's expert in the life cycle of flies, was not qualified as a forensic entomologist, the trial court erred in allowing him to testify regarding the approximate time of Tressler's death.

A trial judge has the discretion to determine if a witness's qualifications render him or her an expert, and this determination will not be overturned absent clear error. Johnson, 438 So. 2d at 777 (noting a trial court's wide discretion regarding evidence admissibility and expert testimony). We conclude that the trial court did not commit error in allowing Dr. Hogsette to utilize his knowledge of the life cycle of flies and relate this knowledge to the estimated time of Tressler's death. During trial, Dr. Hogsette testified concerning his experience in entomology and his involvement in other murder cases, stating that other courts had recognized him as

an expert in the field of entomology and the life cycle of flies. He had worked on forensic cases since the 1970s, utilizing his expert knowledge in determining the age of corpses, and he explained that the work he has performed on flies involved the same principles that a forensic entomologist would use. Of course, there was also other evidence presented during trial, such as the eyewitness testimony of the events preceding the murder, that placed Tressler's death during the time period opined by Dr. Hogsette. We find that the trial court did not err in allowing Dr. Hogsette to testify.

VI. Identification of Tressler and Simmons' Vehicle

Next, Simmons claims the trial court erred in denying Simmons' motion to exclude or preclude the identification of Simmons' vehicle.[14] He argues that the procedures used to identify Simmons' vehicle and Tressler were unnecessarily suggestive because Ms. Renfro was shown only one photograph and one vehicle to identify Tressler and Simmons' vehicle, and Mr. Montz was shown only one vehicle over a year after he first viewed it to identify Simmons' vehicle.[15]

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14. Simmons' brief states that arguments made at the trial court level regarding Simmons' motion to suppress are incorporated by reference into his brief on this appeal. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Duest, 555 So. 2d at 852. Therefore, any arguments not expressly included in Simmons' brief to this Court are not considered in this appeal.

15. Initially, we reject Simmons' arguments that Ms. Renfro's and Mr. Montz's identifications violated Simmons' Sixth Amendment right to counsel. Under

"The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." Grant v. State, 390 So. 2d 341, 343 (Fla. 1980) (citing Neil v. Biggers, 409 U.S. 188 (1972)). In Grant, this Court held that "a suggestive confrontation procedure, by itself, is not enough to require exclusion of the out-of-court identification; the confrontation evidence will be admissible if, despite its suggestive aspects, the out-of-court identification possesses certain features of reliability." 390 So.2d at 343 (citing Manson v. Brathwaite, 432 U.S. 98, 110 (1977)). Therefore, the test for whether a suggestive identification procedure should be excluded has two prongs: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; [and] (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." Id.

In Neil, the United States Supreme Court held that the factors a court should consider to determine the likelihood of misidentification include

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Powell v. Alabama, 287 U.S. 45, 57 (1932), defendants have a right to counsel at critical stages of their cases, including the time between arraignment and the beginning of trial. As the trial court noted and the State argues to this Court, the two cases Simmons cites for his proposition, United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), both involved defendants participating in post-indictment lineups. In Simmons' case, Simmons did not participate in the identifications of Tressler or his vehicle. In fact, Ms. Renfro's identification of Tressler's photograph occurred before Simmons was arrested.

> the opportunity of the witness to view [the person or object] at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the [person or object], the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200. These factors have often been applied to cases involving the identification of defendants, see, e.g, Fitzpatrick v. State, 900 So. 2d 495, 518 (Fla. 2005), and this Court has held that these factors also apply to the identification of physical evidence. Dennis v. State, 817 So. 2d 741, 760 (Fla. 2002) ("The factors to be considered in the determination of whether the identification of the vehicle was reliable are all comparable to factors considered in a witness's identification of a suspect."); Pittman v. State, 646 So. 2d 167, 171 (Fla. 1994) (holding that the Neil factors applied to identification of the defendant's wrecker).

We agree with Simmons that the methods employed by law enforcement in this case were highly suggestive because only one photograph and one vehicle were shown to witnesses, resulting in an affirmative answer to the first prong of the out-of-court identification analysis. See Washington v. State, 653 So. 2d 362, 365 (Fla. 1994) (holding that "the showing of a single photo [is] unduly suggestive"); Way v. State, 502 So. 2d 1321, 1323 (Fla. 1st DCA 1987) (stating that the "use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive

under most circumstances"). However, we find no error in the rulings of the trial court that, considering the totality of the circumstances, the procedures did not "give rise to a substantial likelihood of irreparable misidentification," and we answer the second prong of the out-of-court identification analysis in the negative concerning both Ms. Renfro's and Mr. Montz's identifications.

A. Ms. Renfro's Identifications of Tressler and Simmons' Vehicle

Ms. Renfro testified at trial that she saw a white car slow down at a red light when a woman tried to climb out, screaming, "Help me, help me, please." She stated that the woman looked directly at her with fear in her eyes. As Ms. Renfro approached the car, yelling at the driver to stop, the car sped off, and she got in her van and chased after the car until she lost the car. Ms. Renfro testified that she thought the car was a Chevrolet Corsica, but she didn't "really know [her] cars too well, just the body style reminded [her] of a Corsica." On December 4, 2001, three days later, Ms. Renfro wrote a statement describing the events and people she had witnessed, stating that the woman she saw was an older woman with "shorter, pinned up" brown hair and a white T-shirt. That same day, Detective Perdue showed her one picture of Tressler, which she was able to identify right away. Six days later, on December 10, Ms. Renfro met Detective Perdue at the sheriff's office to view a car parked in the sallie port, which she identified as the car she had seen on the

night of December 1. She testified at the hearing that she was sure it was the same car because of the flag on the side window, a patriotic sticker in the rear window, and the car's blue interior.

Based on these facts, we agree that showing Ms. Renfro one picture of Tressler and one vehicle was "unduly suggestive." See Washington, 653 So. 2d at 365.

> However, . . . a pretrial identification obtained from suggestive procedures is not per se inadmissible, but may be introduced into evidence if "found to be reliable and based solely upon the witness' independent recollection . . . at the time of the crime, uninfluenced by the intervening illegal confrontation."

Id. (quoting Edwards v. State, 538 So. 2d 440, 442 (Fla. 1989)). Ms. Renfro had an abundance of time and good lighting conditions to view the victim and the car. She also gave written descriptions of Tressler and the vehicle she saw the night of December 1 before viewing the single photograph of Tressler or Simmons' vehicle in the sallie port. Because of the timing of the descriptions, we find no error in the trial court's conclusion that they were the result of Ms. Renfro's independent recollection, "uninfluenced by the intervening illegal confrontation." Id. We further conclude, using the Neil factors, that Ms. Renfro had adequate opportunity to view the woman and car she saw on the night of December 1; her descriptions were sufficiently accurate; she was certain of what she saw on the night of December 1; and the length of time between the crime and her identifications was only a matter of days. Therefore, any discrepancies between Ms.

Renfro's descriptions and what Tressler and Simmons' car actually looked like, such as Simmons' claim that Ms. Renfro's description of Tressler's hair was inaccurate, "were the proper subject of cross-examination, but not sufficient to amount to a bar to admissibility." Dennis, 817 So. 2d at 761.

B. Mr. Montz's Identification of Simmons' Vehicle

Mr. Montz's identification of Simmons' vehicle did not occur until a year after he initially described to Detective Perdue the car he witnessed, when Detective Perdue showed him a videotape of Simmons' car. Mr. Montz then identified the car without any hesitancy or uncertainty, and stated that he was sure it was the same car because of its color, the number of doors, the spoked rims, the amount of dirt, and its two dents. He also recalled the flag hanging from the car's window.[16] The trial court found that when applying the Neil factors, the lapse in time between when Mr. Montz initially saw the car and when he was able to identify it would "weigh in favor of finding that there [was] a substantial likelihood of misidentification." However, the trial court held that after examining the totality of the circumstances, there existed no substantial likelihood for misidentification.

16. Simmons argues that Mr. Montz stated that the vehicle he identified was the same vehicle as the one he witnessed a year earlier, except for the dents, dirt, wheels, and trim. However, the record states that Mr. Montz was sure it was the same car because of its color, the number of doors, the spoked rims, the amount of dirt, and its two dents.

First, as with Ms. Renfro, we conclude that Detective Perdue's showing Mr. Montz a videotape of only one vehicle constituted an unduly suggestive identification procedure under the first prong of the out-of-court identification analysis. Further, we agree with the trial court that the length of time that passed between Mr. Montz's first viewing of the car and his identification of it a year later could result in a substantial likelihood of misidentification.

However, considering the other Neil factors, we conclude that the trial court did not err in finding that Simmons has not satisfied the second prong of the test for whether a suggestive identification should be excluded. First, Mr. Montz had an adequate opportunity to view the car the night he witnessed it because the area was well lighted and there was nothing blocking his view. Second, Mr. Montz's degree of attention was high, judging from the accuracy of his description of the car, and his level of certainty was high as well.

VII. The Constitutionality of Florida's Death Penalty Statute

In his next issue on appeal, Simmons argues that Florida's death penalty statute, section 921.141, Florida Statutes (2003), is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). We have previously addressed this contention on direct appeal and have concluded that there is no basis for declaring Florida's statutory scheme facially unconstitutional. See, e.g., Lawrence v. State, 846

So. 2d 440, 451 (Fla. 2003), cert. denied, 540 U.S. 952 (2003); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003). Further, in this case, by use of a special interrogatory verdict, the jury expressly and unanimously found all of the aggravating factors later relied upon by the trial court to impose a death sentence. See Ring, 536 U.S. at 609 (finding that the Sixth Amendment right to a jury trial precludes a procedure by which a sentencing judge alone and without a jury finds aggravating factors sufficient to invoke the death penalty); see also Everett v. State, 893 So. 2d 1278, 1282 (Fla. 2004) (rejecting the defendant's Ring claim because the jury unanimously recommended death, and one of the aggravating factors was that the murder was committed during the course of a sexual battery or burglary, crimes of which the jury also found the defendant guilty), cert. denied, 125 S. Ct. 1865 (2005); Caballero v. State, 851 So. 2d 655, 663-64 (Fla. 2003) (rejecting a Ring claim on direct appeal where one of the aggravating circumstances the judge considered was that the defendant committed the murder during the commission of a burglary and kidnapping).

VIII. Aggravators

In his final argument on appeal, Simmons argues that the trial court erred in finding the evidence sufficient to establish three aggravators of a prior violent felony, the murder being committed during the course of kidnapping and sexual battery, and HAC.

A. Previous Felony Conviction Involving the Use or Threat of Violence to the Person

Simmons had previously been convicted of aggravated assault on a law enforcement officer. Further, section 921.141(5)(b), Florida Statutes (2001), states that an assault involving the threat of violence qualifies as an aggravating factor for purposes of imposing the death penalty. The probable cause affidavit from that case was read to the jury during the penalty phase of this case, and it stated that Simmons' car appeared to deliberately veer into oncoming traffic, forcing a police officer to drive completely off the road to avoid a head-on collision. Simmons argues that because his prior conviction involved a drunk driving incident in which a police officer only thought that Simmons was swerving at him, there was no intent involved and, therefore, this conviction cannot be considered an aggravating factor. However, according to the probable cause affidavit introduced into evidence, Simmons' actions caused the officer to feel threatened and to take evasive measures to avoid a head-on collision. Based on this evidence, the penalty phase jury found that the State proved this aggravating circumstance. Similarly, we conclude that this previous felony conviction was found as an appropriate aggravating factor.

B. Murder Was Committed During the Commission of or Attempted Commission of Kidnapping and Sexual Battery

Simmons next argues that the evidence does not support the finding that the murder occurred during the commission of kidnapping and sexual battery. Simmons was found guilty during the guilt phase of kidnapping and sexual battery using force likely to cause serious injury based on the evidence of sexual injury found on the victim's body. These facts, coupled with the eyewitness testimony placing Tressler in Simmons' car screaming for help the night of December 1, 2001, constitute substantial competent evidence to support the trial court's finding that Simmons committed the murder while engaged in a kidnapping and sexual battery under section 921.141 (5)(d), Florida Statutes (2001).

C. HAC

The HAC aggravator applies "only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Rose v. State, 787 So. 2d 786, 801 (Fla. 2001) (quoting Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998)). Further, this Court has previously "upheld HAC in beating deaths" presenting similar circumstances to those involved herein. Lawrence v. State, 698 So. 2d 1219, 1222 (Fla. 1997); see also Dennis, 817 So. 2d at 766 (trial court's finding of HAC was supported by evidence that the victims suffered skull fractures as the result of a brutal beating and that the victims were

conscious for at least part of the attack); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (trial court's finding of HAC was supported by evidence that the victim was struck seven times in the head and the medical examiner testified that the victim was alive at the time of the infliction of most of the wounds); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (trial court's finding of HAC was supported by evidence that victim was brutally beaten while attempting to fend off blows to the head before he was fatally shot).

In this case, Simmons argues that because it is possible that the first blow to Tressler's head rendered her unconscious, HAC should not apply. However, Dr. Gulino, the medical examiner, described numerous wounds that, in his opinion, were inflicted prior to Tressler's becoming unconscious. Further, Tressler suffered approximately twenty-five defensive wounds and other nonfatal stab wounds and blunt-trauma injuries. Additionally, Dr. Gulino unequivocally stated that the injury to Tressler's anus occurred prior to her death because of the extensive bruising and laceration. Also, Ms. Renfro testified that Tressler appeared terrified when she saw her in Simmons' car the night she was last seen. Based upon all of this evidence, we uphold the trial court's finding of HAC as an aggravating circumstance.

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17. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

IX. Proportionality

The Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases. See Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998). However, this proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)).

In this case, the trial court found three aggravating circumstances: (1) A previous conviction of a felony involving the use or threat of violence to a person; (2) the murder was committed in the course of a kidnapping and sexual battery; and (3) HAC. The court found no statutory mitigators, but did find several nonstatutory mitigators that were given either some or minimal weight. This Court has stated that HAC is one of the most serious aggravators in the statutory sentencing scheme. See Morton v. State, 789 So. 2d 324, 331 (Fla. 2001); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Recently,

in Boyd v. State, 910 So. 2d 167 (Fla. 2005), cert. denied, 126 S. Ct. 1350 (2006), this Court concluded that the death penalty was proportionate where the trial court considered and weighed two aggravating factors (HAC and that the murder was committed while the defendant was committing or attempting to commit kidnapping and sexual battery) against one statutory mitigator (that the defendant had no significant prior criminal history, which the trial court afforded medium weight) and five nonstatutory mitigators (including that the defendant came from a good family and showed remorse for his actions). See also Dessaure v. State, 891 So. 2d 455, 472-73 (Fla. 2004) (death sentence was proportionate where, although the rape kit was negative, the defendant inflicted a total of fifty-three wounds, including multiple lethal stab wounds to the torso and neck; the trial court found that the aggravators of a previous conviction of a violent felony, prior felony conviction, that the murder was committed during a burglary, and HAC outweighed the "age" statutory mitigator and the nonstatutory mitigating factors of caring parents, family background, capacity to form personal relationships, and behavior in court). In light of the totality of the circumstances of this case as compared to the facts of other capital cases, we find the death penalty to be proportionate.

CONCLUSION

For the reasons expressed above, we affirm Simmons' convictions and sentences, including the sentence of death.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, CANTERO, and BELL, JJ., concur.

PARIENTE, C.J., specially concurs with an opinion, in which ANSTEAD and CANTERO, JJ., concur.

WELLS, J., concurs with an opinion.

BELL, J., specially concurs with an opinion.

QUINCE, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, C.J., specially concurring.

I concur in the majority opinion, but write separately on Issue IV, which concerns the exclusion of expert testimony on eyewitness identifications. Twenty-three years ago, this Court, addressing one of six guilt-phase claims in a capital appeal, issued what has become the seminal opinion on this issue in Florida. Applying an "abuse of discretion" review standard, we affirmed the exclusion of expert testimony on the reliability of eyewitness identification. See Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983). We stated:

> A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.

Id. (citations omitted).

In so holding, we signaled to trial judges that expert testimony in this area is unnecessary because the assessment of eyewitness identification is within the common experience of jurors. With one exception, in every case since Johnson in which we have addressed this issue, the trial courts excluded expert testimony on the factors affecting eyewitness identification testimony, and this Court affirmed, relying on the final sentence from Johnson excerpted above, either alone or within the longer passage. See McMullen v. State, 714 So. 2d 368, 370 (Fla. 1998); Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990); Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985). In addition, this Court relied on the determination in Johnson that juries do not need "the aid of expert testimony" to assess eyewitness identification testimony in affirming the refusal of the trial court to authorize payment of costs for an indigent defendant to retain an expert. See Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991), rev'd on other grounds, 505 U.S. 1079 (1992). In the one case reviewed by this Court in which expert testimony in this area was admitted,

we summarily upheld the trial court's limitation on its scope, again relying on Johnson. See Rogers v. State, 511 So. 2d 526, 530 (Fla. 1987).

In the years that have passed since we stated our belief in 1983 that jurors can accurately assess eyewitness identifications without the aid of expert testimony as they do most other evidence, we have learned that quite the opposite is often true. For example, common sense would lead us to believe that greater certainty by an eyewitness in making an identification corresponds to greater accuracy. Yet research shows that a witness's degree of certainty correlates weakly, at best, with the accuracy of the identification. See Elizabeth Loftus & James Doyle, Eyewitness Testimony: Civil and Criminal § 3-12, at 67 (3d ed. 1997) ("The consensus of the literature that deals with [whether eyewitness confidence is an indication of eyewitness accuracy] seems to indicate that eyewitness confidence is not a very good indicator of eyewitness accuracy."). In fact, the "certainty an eyewitness expresses in his identification can be a misleading indicator of the identification's accuracy." Gary L. Wells, Eyewitness Identifications: Scientific Status, in Science In the Law: Social and Behavioral Science Issues 391, 412 (David L. Faigman et al. eds., 2002). Other features of eyewitness unreliability, such as difficulty identifying persons of another race, have also become well established. See Loftus &

Doyle, supra § 4-9, at 86; Wells, supra, at 404. A 2002 report by the Illinois Governor's Commission on Capital Punishment reflects that "[t]he fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law." Report of the Governor's Commission on Capital Punishment 31 (2002), available at http://state.il.us/defender/report.pdf. Similarly, the North Carolina Actual Innocence Commission organized by Chief Justice I. Beverly Lake, Jr., of the North Carolina Supreme Court "chose eyewitness identification as its first topic of study because research has identified misidentification as the leading factor in the wrongful conviction of those exonerated nationally by DNA evidence." Christine C. Mumma, The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause, 52 Drake L. Rev. 647, 652 (2004).

Section 90.702, Florida Statutes (2005), titled "Testimony by experts," provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Focusing on this provision, Justice Anstead wrote separately in McMullen to urge trial courts to admit expert testimony on

eyewitness identifications when such testimony would be helpful to the jury:

> In this case I would approve of the discretionary use of expert testimony about psychological factors that may affect eyewitness identification . . . to give effect to the intent expressed in section 90.702. Further, . . . while the question of admissibility of such expert testimony should be left to the sound discretion of the trial judge, I would attach the . . . caveat that the trial judge must exercise his or her discretion in furtherance of section 90.702's "helpfulness" standard. In considering a proffer of such evidence the trial court should be aware that it has the discretion to admit the evidence. It should be careful in assessing the qualifications of the expert presented as well as in making an evaluation of the helpfulness of the proffered testimony compared to the risk that it may cause juror confusion.

714 So. 2d at 380-81 (Anstead, J., concurring in part and dissenting in part).

Since McMullen, several courts have recognized that the research results fall outside common assumptions about eyewitness identification testimony. For example, in United States v. Mathis, 264 F.3d 321, 340-42 (3rd Cir. 2001), the United States Court of Appeals for the Third Circuit concluded that the jury would illuminated by proffered expert testimony concerning the effect of prior viewings of a suspect's image, the poor correspondence of a witness's confidence to the reliability of an identification, and the effect of weapon focus. The Third Circuit concluded that "testimony of this sort, with its accompanying level of scientific detail, would not simply duplicate jurors' intuitions or common sense, and such principles seem difficult to establish indirectly through cross-

examination." Id. at 341. For this reason, Mathis held that the trial court abused its discretion in excluding expert testimony on the "double identification" effect, as well as on the relationship between eyewitness confidence and accuracy and the effect of the presence of a weapon on accuracy. Id. at 341-42.

Similarly, the United States Court of Appeals for the Sixth Circuit, applying an abuse of discretion standard, ruled that a trial court erred in excluding expert testimony on eyewitness identifications without first determining whether the testimony would be helpful to the jury. See United States v. Smithers, 212 F.3d 306, 315 (6th Cir. 2000). The court stated that the trend in favor of admission of expert testimony is "not surprising in light of modern scientific studies which show that, while juries rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances." Id. at 311-12. The Sixth Circuit cited a "plethora" of authorities supporting this view, including one suggesting that "'jurors are unaware of several scientific principles affecting eyewitness identifications' . . . [and], because many of the factors affecting eyewitness impressions are counterintuitive, many jurors' assumptions about how memories are created are actively wrong." Id. at 312 n.1 (citation omitted) (quoting Roger V. Handberg, Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1022 (1995)).

In Smithers, the Sixth Circuit held that expert eyewitness identification testimony "should be admitted . . . when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications." 212 F.3d at 317. The Georgia Supreme Court has reached a similar conclusion:

> Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification.

Johnson v. State, 526 S.E.2d 549, 552-53 (Ga. 2000) (footnote omitted).

Mistaken identity is the chief cause of wrongful convictions. See Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use Of DNA Evidence to Establish Innocence After Trial (1996) (finding that twenty-four out of twenty-eight cases of postconviction exoneration based on DNA testing were due in great part to mistaken eyewitness identifications); Connie Mayer, Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays, 13 Pace L. Rev. 815, 819 (1994) ("[S]tudies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness

identification evidence."). By bringing to light research findings on factors affecting an eyewitness identification, expert testimony can assist the trier of fact, the criterion for admission of expert testimony under section 90.702.

Our decision in Johnson does not bar the introduction of expert testimony on eyewitness identifications. It is now clear that such testimony can assist the jury in assessing guilt in certain cases, especially where, as some courts have recognized, the only inculpatory evidence is eyewitness testimony. Accordingly, I encourage trial courts to truly exercise their discretion as to the admission of this testimony. Trial judges should consider, as they do with other expert testimony, whether the testimony would assist the jury, i.e., whether it would introduce relevant considerations as to accuracy that could not otherwise be brought to light via cross-examination, jury instructions, or the jurors' common sense. As the research demonstrates and courts increasingly recognize, expert testimony in this area can be a powerful tool in helping the criminal justice system achieve its goal of convicting the guilty while acquitting the innocent.

ANSTEAD and CANTERO, JJ., concur.

WELLS, J., concurring.

I concur in the majority opinion. I write separately to comment upon Chief Justice Pariente's concurring opinion in respect to expert opinion on eyewitness identification, with which I do not agree.

Rather, I agree with the decision in United States v. Smith, 122 F.3d 1355 (11th Cir. 1997), approving United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). In Thevis, the court stated that "[t]o admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence." Id. at 641. I have additional serious concerns about what makes a person a qualified expert who can present testimony about whether a particular eyewitness is reliable. Furthermore, it is my view that expert testimony on the general credibility of eyewitness testimony only serves to cast general doubt as to witnesses not relevant to the specific situation of a particular trial. Again, as the court said in Thevis, "the problems of perception and memory can be adequately addressed in cross-examination and . . . the jury can adequately weigh these problems through common-sense evaluation." Id.

Moreover, such testimony in Florida courts would have to be Frye[17] tested, similar to what we required in Hadden v. State, 690 So. 2d 573 (Fla. 1997). Frye testing raises additional questions. How is such an expert's opinion peer reviewed? How does the

opinion become generally accepted? What is the relevant scientific community?

An excellent summary of the case law on this subject is gathered in Challenge to Eyewitness Identification Through Expert Testimony, 35 Am. Jur. Proof of Facts 3d 1 (1996 & Supp. 2005), by The Honorable D. Duff Mckee.

BELL, J., specially concurring.

I agree with Justice Pariente that there is no rule per se of law against the admission of eyewitness expert testimony. I also agree with her that guidance should be given to trial courts on how to exercise their discretion in deciding whether to admit such testimony. In an effort to provide tangible guidance, I offer four guiding principles and five factors a trial court should consider when determining whether or not eyewitness expert testimony should be admitted in any particular criminal case.[18]

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18. I draw these principles and factors from Florida law as well as from the synthesis of case law from across this nation by The Honorable D. Duff McKee in his excellent article, Challenge to Eyewitness Identification Through Expert Testimony, 35 Am. Jur. Proof of Facts 3d 1 (1996 & Supp. 2005). As does Justice Wells, I commend Judge McKee's work to any judge or trial attorney confront19. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). "Florida courts follow the test set out in Frye." Castillo v. E.I. Du Pont de Nemours & Co., Inc., 854 So. 2d 1264, 1268 (2003)). "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." Id. (quoting Hadden v. State, 690 So. 2d 573, 576 (Fla. 1997)). "We have recently defined 'general acceptance' to mean acceptance by a clear majority of the members of the relevant scientific community, with consideration by the trial court of both the quality and quantity of those opinions." Hadden, 690 So. 2d at 576 n.2 (citing Brim v. State, 695 So. 2d 268 (Fla. 1996)).

Four Guiding Principles

1. Whether to allow expert testimony on the issue of eyewitness identification is left to the sound discretion of the trial judge.
2. As with other witnesses, evaluating the credibility and reliability of eyewitnesses is generally for the jury to determine, without the help of eyewitness experts. Effective cross-examination, presentation of contradictory evidence, sound argument of counsel, and jury instructions are all effective, efficient and generally sufficient means of assisting the jury in properly fulfilling its critical function as fact-finder.
3. Expert testimony on eyewitness identification will be necessary in very limited circumstances.
4. If eyewitness expert testimony is deemed necessary, it must be "Frye tested." The expert's opinion must rest upon research and principles that are generally accepted in the relevant scientific community.

Factors to Consider in a Particular Case

If all of the following factors are present in a particular case and the expert testimony is deemed admissible under Frye,[19] the testimony should be admitted if:

(a) Identification of the defendant is a critical, disputed issue in the case; and

(b) The state's case essentially rests upon the credibility of eyewitness testimony; and

(c) There is little or no other evidence to independently establish that the defendant is the person who committed the crime; and

(d) The expert testimony addresses a specific circumstance of the eyewitness identification and provides a particularized explanation which will assist the jury in sorting out the facts; and

(e) The defendant maintains that he was not present when the offense was committed and advances an alibi.

An Appeal from the Circuit Court in and for Lake County,

T. Michael Johnson, Judge - Case No. 01-CF-2577-01

Janice C. Orr, Eustis, Florida,
for Appellant

Charles J. Crist, Jr., Attorney General, Tallahassee, Florida,
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APPENDIX B

SUPREME COURT OF THE STATE OF FLORIDA

Supreme Court of Florida

TUESDAY, JULY 11, 2006

CASE NO.: SC04- 19

Lower Tribunal No.: 01-CF-2577-01

ERIC SIMMONS vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy

Test:

Thomas D. Hall
Clerk, Supreme Court

kb
Served:

WILLIAM GROSS
JANICE C. ORR
SCOTT A. BROWNE
STEPHEN D. AKE
HON. JAMES C. WATKINS, CLERK
HON. T. MICHAEL JOHNSON, JUDGE

No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

REASON I

RESPONDENT SUBMITS THAT THIS COURT LACKS JURISDICTION TO CONSIDER THE DECISION ISSUED BY THE FLORIDA SUPREME COURT IN SIMMONS V. STATE, 934 SO. 2Dd 1100 (FLA. 2006).

REASON II

THE FLORIDA SUPREME COURT'S DECISION FINDING THAT PETITIONER VOLUNTARILY GAVE A STATEMENT TO LAW ENFORCEMENT OFFICERS DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT.

REASON III

PETITIONER'S REQUEST FOR THIS COURT TO ISSUE AN ADVISORY OPINION IS WITHOUT MERIT.

REASON IV

THIS COURT SHOULD DENY CERTIORARI REVIEW TO CONSIDER PETITIONER'S CLAIM REGARDING THE FLORIDA SUPREME COURT'S REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

REASON V

THE FLORIDA SUPREME COURT PROPERLY CONSIDERED THIS COURT'S DECISION IN NEIL V. BIGGERS, 409 U.S. 188 (1972), WHEN ANALYZING PETITIONER'S CLAIM CONCERNING THE EYEWITNESSES' IDENTIFICATION OF THE VICTIM AND OF PETITIONER'S AUTOMOBILE.

REASONS VI AND VII

THIS COURT SHOULD REJECT PETITIONER'S SUGGESTION TO ADOPT A BRIGHT LINE RULE ON THE

ADMISSIBILITY OF EXPERT WITNESS' TESTIMONY CONCERNING THE RELIABILITY OF EYEWITNESS IDENTIFICATION.

REASON VIII

THE FLORIDA SUPREME COURT PROPERLY APPLIED THIS COURT'S APPLICABLE LAW WHEN UPHOLDING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS VEHICLE.

REASON IX

PETITIONER HAS NOT PRESENTED A FEDERAL CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW BASED ON HIS CLAIM THAT THE STATE COURT LACKED VENUE.

REASON X

THIS COURT SHOULD DENY CERTIORARI REVIEW TO CONSIDER PETITIONER'S ARGUMENT REGARDING HIS ALLEGED WRONGFUL CONVICTION.

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No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,
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STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
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OPINION BELOW

The Florida Supreme Court's opinion in the instant case is reported as Simmons v. State, 934 So. 2d 1100 (Fla. 2006), and a copy of the opinion is contained in the appendix to this response (App. A).

JURISDICTION OF THE SUPREME COURT

Respondent submits that this Court lacks jurisdiction to review the instant case because the decision is not a "final judgment" by the highest court of a State. See 28 U.S.C. § 1257(a) (establishing that certiorari review is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had"); see also Jefferson v. City of Tarrant, 522 U.S. 75 (1997). As will be discussed in greater detail in the Questions Presented section, infra, Respondent submits that the Florida Supreme Court's decision is not final because the court has yet to rule on Petitioner's Motion for Clarification and Request for Written

Opinion or issue its mandate.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts the Petitioner's statement of the constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement is argumentative, conclusory, and factually inaccurate. Respondent submits that the factual recitation contained in the Florida Supreme Court's opinion provides an accurate portrayal of the facts as adduced at Petitioner's trial:

> The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing and beating of Deborah Tressler, who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively.
>
> Prosecution Evidence
>
> The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene

technician Theodore Cushing took pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain vehicle tracks were present closer to the body, but they appeared older and deteriorated.

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was

already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

After identifying the body as Tressler's, crime scene technicians went to the trailer where Tressler lived and the laundromat where she worked to conduct Luminol testing. They found Tressler's purse at the laundromat and located a

birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in

excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew Tressler from the laundromat, he often saw Simmons and Tressler together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with Tressler at the laundromat on the night of December 1, 2001. When he arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got Tressler's attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and Tressler were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it,

but he was unable to identify any as Tressler's boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as Tressler's boyfriend.

Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a helicopter flying overhead. Simmons acknowledged that he knew Tressler was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object. Detectives Perdue and Adams removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and video capabilities, although the videotape was allowed to run out after two hours.

Simmons waived his Miranda rights and stated that he was friends with Tressler and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the

laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger seat cushion, the carpet below the passenger seat in the front and back, and especially the area of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on

the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion, the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be used to differentiate between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus, or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, Tressler's mother; determined that each had an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the

lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from three different areas, combined them into one sample, but did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained a DNA profile that matched Tressler's. Mr. Johnson also matched Tressler's DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.

Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of Tressler's death from the insect specimens collected by the LCSO. He also could not determine whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.

Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results

> regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the State's lab did a search of the DNA bases only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.
>
> Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.
>
> At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment.

Simmons v. State, 934 So. 2d 1100, 1105-09 (Fla. 2006) (footnotes omitted). Based on this evidence, the jury convicted Petitioner of kidnapping, sexual battery, and first-degree murder. The jury unanimously recommended the death penalty and the trial court sentenced Petitioner to death for the murder of Deborah Tressler.

On May 11, 2006, the Florida Supreme Court affirmed Petitioner's convictions and sentence. Petitioner filed a Motion for Rehearing, which the Florida Supreme Court denied. On July 19, 2006, Petitioner filed a Motion for Clarification and Request

for Written Opinion. On August 11, 2006, Petitioner filed a Motion to Stay Issuance of Mandate. As of the date of this filing, the Florida Supreme Court has not ruled on the Motion for Clarification and Request for Written Opinion and has yet to issue its Mandate.

REASONS FOR DENYING THE WRIT

REASON I

RESPONDENT SUBMITS THAT THIS COURT LACKS JURISDICTION TO CONSIDER THE DECISION ISSUED BY THE FLORIDA SUPREME COURT IN SIMMONS V. STATE, 934 SO. 2D 1100 (FLA. 2006).

The jurisdiction of this Court to review state court decisions is governed by 28 U.S.C. § 1257(a). This section provides, in pertinent part, that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . " 28 U.S.C. § 1257(a). This Court stated in Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997):

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551, 89 L. Ed. 1171, 65 S. Ct. 770 (1945). As we have recognized, the finality rule "is not one of those technicalities to

> be easily scorned. It is an important factor in the smooth working of our federal system." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945).

In the instant case, the state court judgment is still subject to further review by the Florida Supreme Court given the motions that are still pending in the state court. Typically, the Florida Supreme Court issues its mandate 15 days after the denial of a motion for rehearing. See Fla. R. App. P. 9.340(a). However, if a timely motion for rehearing or clarification is filed, the time for issuance of the mandate shall be extended until 15 days after rendition of the order denying the motion, or, if granted, until 15 days after the cause has been fully determined. Fla. R. App. P. 9.340(b). Here, Petitioner filed a Motion for Clarification prior to the issuance of a mandate. This motion, as well as Petitioner's subsequent Motion to Stay Issuance of Mandate, are still pending in the Florida Supreme Court. Because the state court may subject this case to further review, Respondent submits that the decision is not final for the purposes of establishing jurisdiction with this Court pursuant to 28 U.S.C. § 1257(a). Accordingly, this Court should deny the instant petition.

REASON II

THE FLORIDA SUPREME COURT'S DECISION FINDING THAT PETITIONER VOLUNTARILY GAVE A STATEMENT TO LAW ENFORCEMENT OFFICERS DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT.

Petitioner urges this Honorable Court to exercise its certiorari jurisdiction to consider the Florida Supreme Court's decision affirming the denial of his motion to suppress.

Petitioner asserts that the Florida Supreme Court misapplied applicable law in holding that Petitioner was not under arrest when he voluntarily decided to accompany law enforcement officers to the police station. As will be seen, Petitioner has failed to demonstrate any compelling reasons for this Court to exercise its discretionary certiorari jurisdiction.

Rule 10 of this Court's rules provides the relevant considerations in determining the propriety of certiorari review:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . .
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This case involves neither conflict nor unsettled federal law. Although the failure to meet any of these considerations is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Ins. Co. v. Illinois Department of Revenue, 482 U.S. 182, 184 n.3 (1987).

Petitioner asserts that his statements and confession to law enforcement officers were admitted in violation of his Fourth Amendment rights because he was illegally seized without

probable cause. Petitioner asserts that the Florida Supreme Court incorrectly distinguished the instant case from Hayes v. Florida, 470 U.S. 811 (1985), and further claims that his case is factually analogous to Kaupp v. Texas, 538 U.S. 626 (2003). Contrary to Petitioner's assertions, the Florida Supreme Court properly distinguished the instant case from Hayes and found that Petitioner voluntarily accompanied law enforcement officers to the police station to give a statement.

Petitioner argued to the Florida Supreme Court that his case was similar to Hayes. In Hayes, this Court held that law enforcement violated the defendant's Fourth Amendment rights when they, without probable cause or a warrant, involuntarily removed the defendant from his home and transported him to the station where he was briefly detained for the purposes of obtaining fingerprints. This Court found that such involuntary transport to a police station for questioning is "sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause." Hayes, 470 U.S. at 816. As the Florida Supreme Court properly noted when distinguishing Hayes, the unrebutted testimony at the motion to suppress hearing clearly established that Petitioner voluntarily consented to being transported to the police station and further voluntarily gave a statement to detectives.

Petitioner argues that given the totality of the circumstances surrounding his encounter, he merely submitted to the claim of legal authority. In Kaupp, this Court noted that a "seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Kaupp, 538 U.S. at 629. In Kaupp, this Court found that the adolescent defendant did not have any options but to submit to the authority of the officers when at least three officers woke him up in his bedroom at three in the morning with a flashlight and stated that "we need to go and talk." The officers

removed the defendant in handcuffs, without shoes, dressed only in his underwear in January, and drove him to the scene of the crime and then to the sheriff's office for questioning. Id. at 628, 631.

Unlike the situation in Kaupp, Petitioner was approached by two unarmed, plainclothed detectives on his family's property. Although Petitioner references the lead detective's testimony that a "thundering herd" of officers arrived at the large rural property, including a helicopter overhead, the testimony from the motion to suppress hearing established that these ten to fifteen officers remained outside the property and only two detectives approached Petitioner as he emerged from the woods on his all-terrain vehicle. As the Florida Supreme Court properly found, "the record shows that most of these officers were not directly involved in any confrontation with Simmons or the conversation between Simmons, Detective Adams, and Detective Purdue." Simmons v. State, 934 So. 2d 1100, 1114 (Fla. 2006).

As Justice Stewart noted in his opinion in United States v. Mendenhall, 446 U.S. 544, 554 (1980), there are several "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave," including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." In the instant case, although there were a large number of officers at Petitioner's parents' property, only two unarmed, plainclothes detectives were closely involved with Petitioner and the circumstances clearly establish that he was free to refuse to accompany them to the station. As the state trial court noted when denying Petitioner's motion to suppress, the detectives did not use threatening or commanding language and the other officers were not encircling Appellant or drawing their guns or behaving in any intimidating manner. See Appendix B at B10.

Although Petitioner was briefly handcuffed while being transported to the police station for questioning, the officers

informed him that it was solely for officers' safety, and removed the handcuffs once they arrived at the police station. Prior to conducting the interview, Petitioner signed a Miranda waiver form. During the interview, the detectives allowed Petitioner breaks to use the restroom and to eat dinner. Detectives informed Petitioner that they would provide him with a ride home and reassured him that he was not under arrest at that time. Given these circumstances, the state courts properly found that Petitioner's statements were voluntarily given.

Additionally, unlike the situation in Hayes and Kaupp, the law enforcement officers in the instant case had probable cause to detain Petitioner. Petitioner misrepresents the facts by stating that the lead detective testified that the officers lacked probable cause for an arrest.[1] Petition for Writ of Certiorari at 6. Rather, as the state trial court noted, the lead detective testified that had he had the opportunity to compare notes with other officers at the time of the encounter, they could have probably established probable cause for an arrest. See Appendix B at B14; Simmons, 934 So. 2d at 1114 ("At the time of the interview, detectives had statements from Simmons' friends and acquaintances that indicated that he was Tressler's boyfriend and that he was the last person seen with Tressler while she was alive. They also had a statement from Mr. Rodriguez that he saw Simmons with Tressler between 10:30 p.m. and 10:45 p.m. on December 1, 2001. Moreover, Simmons' car matched the description of the car that two witnesses saw at about midnight on December 1, from which a woman matching the description of Tressler was attempting to flee. Detectives also had statements from witnesses that Simmons may have beaten Tressler earlier in the week, and they knew that he had

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[1] Petitioner further incorrectly states that it "appears" that the Florida Supreme Court found that Petitioner was in custody because the court considered the alternate argument that law enforcement officers had probable cause. As the clear language in the Florida Supreme Court's opinion establishes, the court found that Petitioner was *not* in custody, but voluntarily accompanied officers to the police station. See Simmons, 934 So. 2d 1113-15.

previously been arrested for abusing a prior spouse or girlfriend."). Because the Florida Supreme Court's decision affirming the lower court's denial of Petitioner's motion to suppress does not conflict with any decision from this Court, as alleged by Petitioner, this Court should deny his petition for writ of certiorari.

REASON III

PETITIONER'S REQUEST FOR THIS COURT TO ISSUE AN ADVISORY OPINION IS WITHOUT MERIT.

Petitioner asserts that this Court should grant review in this case in order to set standards "for the proper use of confessions to provide lower courts with guidance and to ensure equal protection under the law." Specifically, Petitioner argues that his confession was erroneously admitted because it was not recorded in any fashion[2] and was simply a sarcastic statement that did not amount to an acknowledgment of guilt.

Petitioner has failed to satisfy any of the criteria set forth by this Court in Rule 10 for the granting of certiorari review based on this argument. Petitioner cites this Court's decision in Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944), for the proposition that the "Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession." Petitioner does not address how the instant case conflicts with Ashcraft, but rather, Petitioner vaguely asserts that the state court erred in utilizing his confession because it was not corroborated. Obviously, the facts of the instant case are clearly distinguishable from the interrogation involved in Ashcraft that resulted in his coerced

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[2] Law enforcement officers were videotaping Petitioner's statement, but the officers were unaware that the 2-hour long tape had run out prior to Petitioner's statement that "if they found blood in the car, he must have done it."

confession.[3]

Petitioner's main complaint is that his confession should not have been considered because he was being sarcastic to the officers and his confession was not recorded. Of course, Petitioner never testified at either the motion to suppress hearing or at trial, that he was being sarcastic and Petitioner never denied making the statement. Although law enforcement were tape-recording Petitioner's statement, the conclusion of his statement, including this confession, was inadvertently not recorded because the tape had run out. The issue of whether Petitioner's statement that "if you found blood, I must have done it," was simply a sarcastic comment in response to the detective's revelation that blood had just been discovered in his automobile, or was in fact an acknowledgment of guilt, was an issue that was properly submitted to the trier of fact. This Court has never required that a defendant's statements be recorded in order for the statement to be admissible at trial. As such, Petitioner's argument is without merit.

REASON IV

THIS COURT SHOULD DENY CERTIORARI REVIEW TO CONSIDER PETITIONER'S CLAIM REGARDING THE FLORIDA SUPREME COURT'S REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

Petitioner asserts that the Florida Supreme Court's review

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[3] Ashcraft was interrogated by investigators under bright light, without sleep or rest, for over thirty-six hours. Ashcraft, 322 U.S. at 150-51. Here, Petitioner voluntarily gave a statement to law enforcement officers after waiving his Miranda rights, and confessed when confronted with the fact that blood was found in his vehicle. Whether Petitioner's statement that "if you found blood, I must have done it," was simply a sarcastic comment, as argued by Petitioner, or an acknowledgment of guilt, as argued by the prosecution, was an issue that was properly submitted to the trier of fact.

of the sufficiency of the evidence was unconstitutional because the court failed to utilize a special standard of review for circumstantial evidence cases. Counsel for Petitioner, Simmons' trial attorney below, simply takes issue with facts as presented by the State and the Florida Supreme Court's subsequent review of this evidence.

This Court's Rule 15.2 admonishes counsel that they have an obligation to this Court to point out in the brief in opposition "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Here, Petitioner makes numerous misstatements of facts when arguing that the evidence was insufficient to support his convictions. Petitioner argues that the "facts" relied on by the Florida Supreme Court were not supported by the record. Contrary to Petitioner's assertions, the facts as established by the prosecution were exactly as the Florida Supreme Court set forth in their lengthy recitation of the facts. See Simmons, 934 So. 2d at 1105-09. Furthermore, as the Florida Supreme Court properly noted, Petitioner's case was not entirely circumstantial.

In arguing that the Florida Supreme Court should have utilized a special standard of review in his case because it was based entirely on circumstantial evidence,[4] Petitioner seeks a fact-based review of the sufficiency of the evidence which is

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[4] In reviewing Petitioner's sufficiency of the evidence claim on direct appeal, the Florida Supreme Court stated:

> In this case, **there was physical evidence and eyewitness testimony, as well as Simmons' statements**, linking Simmons to Tressler at the time of the murder. We agree with the State that the jury, as the trier of fact, was entitled to draw an inference that Simmons was acknowledging guilt from his statement that he "must have did it." Therefore, this case is not entirely circumstantial. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002) (stating that when the evidence in a case is "both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases").

Simmons, 934 So. 2d at 1111 (emphasis added).

inappropriate for certiorari review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). This Court is "consistent in not granting certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Mem'l Park Cemetery Inc., 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)).

Even if this Court were to review the facts underlying Simmons' case, a brief review of the evidence establishes that this claim is without merit. The evidence contradicted Appellant's story that he had dropped the victim off at her place of employment, a laundromat, early on Saturday evening. Rather, witnesses observed Appellant and the victim together at the laundromat late on Saturday evening near midnight, and shortly thereafter, observed the victim screaming for help and attempting to jump out of Appellant's moving vehicle only a few miles away. After the victim was found dead in a wooded field, law enforcement officers located tire impressions near the body that were consistent with the two rear tires from Appellant's vehicle. Furthermore, blood consistent with the victim's was found in a very large stain underneath the upholstery on the passenger seat cushion of Appellant's car[5] and her blood spatter was found on the passenger door jamb and trim. Finally, when confronted by detectives with the fact that blood had been found in his car, Appellant stated that "he must have done it." As noted by the Florida Supreme Court, this direct and circumstantial evidence "establish[ed] beyond a reasonable doubt" that Simmons was the perpetrator of these crimes. Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

Clearly, the Florida Supreme Court's review of the

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[5] The State had to utilize mitochondrial DNA testing on this blood stain because it was degraded. Law enforcement technicians discovered partially consumed cleaning supplies in the vehicle when it was seized approximately a week after the murder.

evidence did not run afoul of the Constitution. This Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged." In re Winship, 397 U.S. 358, 364 (1970); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979) (stating that the reviewing court must view "the evidence in the light most favorable to the prosecution" and the trier of fact, not the appellate court, holds the responsibility to fairly "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts"). The Florida Supreme Court followed this requirement in the instant case. See Simmons, 934 So. 2d at 1111 ("In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt."), quoting Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001). Although Petitioner contends that the evidence is insufficient to support his convictions, the jury, the state trial judge, and the Florida Supreme Court all found that the evidence established, beyond a reasonable doubt, that Petitioner was guilty of first degree murder, kidnaping and sexual battery.

REASON V

THE FLORIDA SUPREME COURT PROPERLY CONSIDERED THIS COURT'S DECISION IN NEIL V. BIGGERS, 409 U.S. 188 (1972), WHEN ANALYZING PETITIONER'S CLAIM CONCERNING THE EYEWITNESSES' IDENTIFICATION OF THE VICTIM AND OF PETITIONER'S AUTOMOBILE.

Petitioner asserts that certiorari review should be granted because the out-of-court identifications of Petitioner's vehicle

and of the victim were improperly admitted in violation of his due process rights under the Fourteenth Amendment. Petitioner agrees that the state trial court and the Florida Supreme Court properly utilized the standard set forth by this Court in Neil v. Biggers, 409 U.S. 188 (1972), when addressing his motion to suppress and/or preclude in-court identification, but Petitioner argues that the Florida Supreme Court erred in finding that the totality of the circumstances did not give rise to a substantial likelihood of irreparable misidentification.

Clearly, the instant issue does not warrant certiorari review. Petitioner concedes that the proper rule of law was applied,[6] but seeks a fact-based review of the state court's findings. As previously noted, infra at 20-21, fact-based review is inappropriate for certiorari review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Because the instant case does not conflict with any decision from this Court or involve any unsettled question of federal law, certiorari review should be denied.

REASONS VI AND VII

THIS COURT SHOULD REJECT PETITIONER'S SUGGESTION TO ADOPT A BRIGHT LINE RULE ON THE ADMISSIBILITY OF EXPERT WITNESS' TESTIMONY CONCERNING THE RELIABILITY OF EYEWITNESS IDENTIFICATION.

Petitioner urges this Court to adopt a per se rule regarding the admissibility of defense expert witness testimony on the issue of eyewitness identification. Petitioner further contends that the

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[6] Respondent would note that this Court has not extended the Neil factors to the identification of physical evidence or victims, as has been done by the State court.

Florida Supreme Court erred in affirming the trial judge's discretionary decision to preclude expert testimony on this subject. Respondent submits that the admissibility of expert witness testimony on this issue is subject to the discretion of the trial judge, and the Florida Supreme Court properly concluded that the trial court acted within its discretion in excluding the expert witness' testimony in the instant case.

This Court should deny certiorari review of the instant claims because Petitioner did not present the instant issues as constitutional questions to the state courts. Even had Petitioner presented the issue as such, it lacks merit. This Court has previously held that "when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet the fundamental standards of due process." Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Of course, this Court noted that the right to present relevant testimony is not without limitation and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Rock, 483 U.S. at 55-56.

In the instant case, the Florida Supreme Court affirmed the lower court's evidentiary ruling because the trial judge had wide discretion concerning the admissibility of evidence under Florida's rules of evidence. Florida courts have stated that "[e]xpert testimony should be excluded when the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusion. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." Simmons, 934 So. 2d at 1116-17 (quoting Johnson v. State, 438 So. 2d 774 (Fla. 1983)). Because the state law's discretionary decision does not violate any of Petitioner's constitutional rights, this Court should deny certiorari review.

REASON VIII

THE FLORIDA SUPREME COURT PROPERLY APPLIED THIS COURT'S APPLICABLE LAW WHEN UPHOLDING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS VEHICLE.

Petitioner reasserts the argument he made to the state courts that, due to factual inaccuracies in the affidavit that supported the magistrate's decision to grant a search warrant, the trial court erred in denying his motion to suppress. The state trial court and the Florida Supreme Court both rejected Petitioner's argument that there were intentional or recklessly false statements in the search warrant, and Petitioner's continued insistence to this Court that there were such inaccuracies is misleading.[7] Because Petitioner's argument is factually inaccurate, and because the state courts relied on an alternative basis to deny the motion,[8] this Court should deny certiorari review.

The Florida Supreme Court recognized this Court's holding in Franks v. Delaware, 438 U.S. 154 (1978), that

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[7] Because the Florida Supreme Court meticulously went through each of Petitioner's allegations in its decision, Respondent will not detail each of these alleged inaccuracies. See Simmons, 934 So. 2d at 1115-17. In short, contrary to Petitioner's assertions, the facts from the suppression hearing established that: (1) the affiant, Detective Brewer, did not falsify his qualifications; (2) Ms. Renfro's identification of the victim was not misstated; and (3) the detective's observation of blood in the Petitioner's car was not refuted.

[8] As both the trial court and the Florida Supreme Court properly found, law enforcement officers could have searched the vehicle without a search warrant pursuant to the Carroll doctrine because they had probable cause. Simmons, 934 So. 2d at 1116; see also Carroll v. United States, 267 U.S. 132 (1925) (stating that automobiles may be searched without a warrant where a law enforcement officer has probable cause for believing that the vehicle is carrying contraband); Chambers v. Maroney, 399 U.S. 42 (1970) (finding Carroll doctrine applicable even after law enforcement towed the car to the police station).

"deliberate falsity or reckless disregard for the truth in an affidavit that gives rise to a search warrant can, in some instances, lead to suppression of evidence obtained under that warrant." Simmons, 934 So. 2d at 1115. False statements will only invalidate a search warrant if, after excising the erroneous information, the remaining true statements are insufficient to establish probable cause. Id. In the instant case, the trial court and the Florida Supreme Court properly applied the applicable law, but rejected Petitioner's assertion that there were false statements which needed to be excised from the affidavit. As such, the instant case does not present an issue that justifies the exercise of this Court's certiorari review.

REASON IX

PETITIONER HAS NOT PRESENTED A FEDERAL CONSTITUTIONAL QUESTION FOR THIS COURT'S REVIEW BASED ON HIS CLAIM THAT THE STATE COURT LACKED VENUE.

Petitioner's argument concerning the state courts' determination that the Lake County, Florida circuit court had original jurisdiction and venue over the criminal charges pending against Petitioner does not present a federal constitutional question. The state courts followed applicable state constitutional law in determining that venue was proper in the circuit court. Simmons, 934 So. 2d at 1112; see also Art. I, § 16, Fla. Const. ("In all criminal prosecutions the accused shall, . . . have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the

boundaries of the state shall be fixed by law."). The issue of venue is a state law question that does not implicate any of Petitioner's federal constitutional rights.

REASON X

THIS COURT SHOULD DENY CERTIORARI REVIEW TO CONSIDER PETITIONER'S ARGUMENT REGARDING HIS ALLEGED WRONGFUL CONVICTION.

In his last issue, Petitioner argues that he is an innocent man who was wrongfully convicted and his trial made "a mockery of the judicial process." Petition for Writ of Certiorari at 26. Petitioner does not present any new legal arguments in support of this Court granting certiorari, but merely presents counsel's erroneous and biased view of the evidence. As noted throughout this brief in opposition, Petitioner's counsel continues to misrepresent the facts as presented at the trial, and also omits discussing the facts which inculpate her client. As the Florida Supreme Court noted when extensively discussing the facts of this case, "there is sufficient evidence to find Simmons guilty of kidnapping, sexual battery, and first-degree murder." Simmons v. State, 934 So. 2d 1100, 1112 (Fla. 2006). Because Petitioner is unable to demonstrate any compelling reasons for this Court to grant certiorari review, Respondent requests that this Honorable Court deny Petitioner's petition for writ of certiorari.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX TO APPENDIX

Appendix A Simmons v. State, 934 So. 2d 1100 (Fla. 2006)

Appendix B Order Denying Motion to Suppress Defendant's Statements, Simmons v. State, Lower Court Case #01-CF-2577

ERIC SIMMONS, Appellant, vs. STATE OF FLORIDA, Appellee.

No. SC04-19

SUPREME COURT OF FLORIDA

934 So. 2d 1100; 2006 Fla. LEXIS 813; 31 Fla. L. Weekly S 285

May 11, 2006, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication July 11, 2006. Rehearing denied by Simmons v. State, 2006 Fla. LEXIS 1548 (Fla., July 11, 2006)

PRIOR HISTORY: An Appeal from the Circuit Court in and for Lake County, T. Michael Johnson, Judge - Case No. 01-CF-2577-01.

DISPOSITION: Affirmed.

COUNSEL: Janice C. Orr, Eustis, Florida, for Appellant. Charles J. Crist, Jr., Attorney General, Tallahassee, Florida, Stephen D. Ake and Scott A. Browne, Assistant Attorney Generals, Tampa, Florida, for Appellee.

JUDGES: PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, CANTERO, and BELL, JJ., concur. PARIENTE, C.J., specially concurs with an opinion, in which ANSTEAD and CANTERO, JJ., concur. WELLS, J., concurs with an opinion. BELL, J., specially concurs with an opinion. QUINCE, J., concurs in result only.

OPINION: [*1104] PER CURIAM.

We have on appeal a judgment of conviction of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder of Deborah Tressler, and a sentence of death for the murder conviction. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons stated herein, we affirm the convictions and sentence.

[*1105] FACTS AND PROCEDURAL HISTORY

The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing [**2] and beating of Deborah Tressler, who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively. n1

> n1 The sentence for sexual battery was to run consecutive to the sentence for kidnapping, and the sentence for kidnapping was to run consecutive to the sentence of death for first-degree murder.

Prosecution Evidence

The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene technician Theodore Cushing took [**3] pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail

for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain vehicle tracks were present closer to the body, but they appeared older and deteriorated.

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. n2 There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was [**4] another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, [*1106] as if a specific type of object,

like threads on a pipe, had caused [**5] it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

n2 Lacerations occur due to an impact with a blunt force, as opposed to a cut from a sharp object, such as a knife.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy. n3 Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001. n4

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n3 This evidence included a vial of Tressler's blood, hairs from her hand, her clothing, insect larvae, and a sexual assault kit.

n4 Dr. Hogsette explained that there are three larval instar stages, and the larvae taken from Tressler's body were in the first and second instar stage.

[**6]

After identifying the body as Tressler's, crime scene technicians went to the trailer where Tressler lived and the laundromat where she worked to conduct Luminol testing. They found Tressler's purse at the laundromat and located a birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it [**7] as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford Taurus [**8] as the car she saw at the intersection, [*1107] and she recognized the interior, the

bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew Tressler from the laundromat, he often saw Simmons and Tressler together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with Tressler at the laundromat on the night of December 1, 2001. When he arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got Tressler's attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and Tressler were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it, but he was unable to identify any as Tressler's boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons [**9] and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as Tressler's boyfriend.

Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a helicopter flying overhead. Simmons acknowledged that he knew Tressler was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object.

Detectives Perdue and Adams removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and video capabilities, although the videotape was allowed to run out after two hours.

Simmons waived his Miranda n5 rights and stated that he was friends [**10] with Tressler and had tried to help her improve her living conditions. n6 Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings during her autopsy. During a break in the interview, the detectives learned that [*1108] blood had been found in Simmons' car. n7 After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

n5 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

n6 Tressler lived in a trailer without plumbing behind the Oasis bar; she had to wash herself with a garden hose outside.

[**11]

n7 The detectives took turns leaving the room during the interview to check on the status of Simmons' car, which had been towed to the LCSO while detectives were interviewing Simmons. After the police obtained a search

warrant, Detective Perdue watched the technicians perform a presumptive test on a suspected blood stain in the car, which indicated that it was blood.

Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger seat cushion, the carpet below the passenger seat in the front and back, and especially the area [**12] of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion, the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be used to differentiate between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus, or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, Tressler's mother; determined that each had [**13] an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from three different areas, combined them into [*1109] one sample, but did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained [**14] a DNA profile that matched Tressler's. Mr. Johnson also matched Tressler's DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.

Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of Tressler's death from the insect specimens collected by the LCSO. He also could not determine

whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.

Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the State's lab did a search of the DNA bases [**15] only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.

Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.

At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment. n8

> n8 The grand jury indictment charged Simmons with murder in the first-degree due to the murder being from a premeditated design or while engaged in the felony of sexual battery. The jury simply found Simmons guilty of first-degree murder without differentiating between the two.

[**16]

Penalty Phase

During the penalty phase, the State presented victim impact evidence from a customer of the laundromat where Tressler worked and Tressler's father. The defense produced the probable cause affidavit involving Simmons' prior conviction in 1996 for aggravated assault with a deadly weapon against a law enforcement officer. Defense counsel also called a corrections officer to testify regarding Simmons' behavior while he was incarcerated during the trial, and Simmons' sister to provide character evidence for Simmons. n9

> n9 These witnesses were Sergeant Craig Leslie and Ashley Simmons. Sergeant Leslie testified that Simmons had one incident of disciplinary confinement because he engaged in a fight with another inmate, which was not surprising to Sergeant Leslie considering Simmons' stay in jail of a year and nine months at that time. Ashley Simmons testified that Simmons came from a loving, close-knit family, and he was always helping other people, which "got him in the position he's in today."

[*1110] The jury [**17] unanimously returned an advisory verdict recommending a death sentence for the murder. The special interrogatory verdict form specifically indicated that the jury found unanimously that the State had proven three aggravating factors beyond a reasonable doubt: (1) Simmons was previously convicted of a felony involving the threat of violence to a person; (2) the crime for which Simmons was to be sentenced was committed during the commission of or attempt to commit sexual battery, kidnapping, or both; and (3) the crime for which Simmons was to be sentenced was heinous, atrocious, or cruel (HAC).

The trial court held a Spencer n10 hearing and heard testimony from Dr. Elizabeth McMahon, the defense's mental health expert. She testified that Simmons had a moderate-to-severe learning disability but no significant history of violence.

Because the jury was not privy to these opinions, the trial court considered the jury's recommended sentence, but also independently weighed the evidence of aggravating and mitigating circumstances in determining Simmons' sentence. The trial court agreed with the jury's findings of the three aggravators, giving moderate weight to the prior felony conviction [**18] aggravator and great weight to the other two. The court rejected the defense's proposed statutory mitigating circumstance of Simmons' age of twenty-seven because there was no evidence that he functioned at a level below his age in anything but reading. The court also rejected all other statutory mitigating factors, but found a number of nonstatutory mitigating factors: (1) Simmons manifested appropriate courtroom behavior (some weight); (2) Simmons was kind to the victim (some weight); (3) Simmons loves and cares for animals (minimal weight); (4) Simmons was active in his church and a mentor to boys who belonged to the church's Royal Rangers (some weight); (5) Simmons had a good family background and came from a closely knit, caring family (some weight); (6) Simmons was employed (some weight); (7) Simmons has a learning disability (some weight); and (8) Simmons is immature (some weight). The trial court rejected three other proposed mitigating circumstances as either not proven or not mitigating in nature, and imposed the death penalty for the murder. n11

n10 Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[**19]

n11 The mitigating circumstances rejected by the trial court were: (1) Simmons' manifestation of appropriate behavior while at the jail (not proven); (2) residual or lingering doubt that Simmons is guilty and that Simmons' behavior is inconsistent with the psychological profile of a murderer (not proven and not admissible to prove innocence because it is inadmissible to prove guilt); and (3) the prosecution of Simmons was partially predicated

upon circumstantial evidence (not mitigating).

ISSUES ON APPEAL

On appeal, Simmons raises eleven issues: (1) the guilty verdicts on the charges of kidnapping, sexual battery, and murder are not supported by the evidence; (2) the trial court did not have jurisdiction and venue was not proper in Lake County; (3) the trial court erred in denying Simmons' motion to suppress his statement to law enforcement officers and evidence obtained from the search of his vehicle; (4) [*1111] the trial court erred in allowing the State's expert on mtDNA to testify before the jury; (5) the prosecuting attorney made improper remarks regarding the mtDNA evidence; (6) the trial court [**20] erred in excluding the testimony of a defense expert in eyewitness identification; (7) the trial court erred in allowing the State's entomology expert to testify as an expert in the life cycle of flies; (8) the trial court erred in denying Simmons' motion to exclude an in-court identification of Simmons' vehicle; (9) the prosecutor engaged in misconduct that rose to the level of preventing a fair trial; (10) Florida's death penalty statute is unconstitutional; and (11) the trial court erred in imposing aggravators to arrive at the death sentence. We address each of these issues. n12 In addition, although not raised by Simmons, we have reviewed the record and conclude that, in light of the totality of the circumstances, Simmons' death sentence is proportionate when compared to the facts of other death penalty cases.

n12 We find that Simmons' claim that the State's witness on mtDNA testing was not qualified to testify is waived because defense counsel failed to object to his qualifications at trial. See Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987)("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court."). We also find that Simmons' claim that the

prosecutor made improper remarks concerning the mtDNA evidence on Simmons' car seat is waived because Simmons' counsel did not properly brief this issue for appeal. See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); see also Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Likewise, we conclude that Simmons' argument that the prosecutor engaged in misconduct that rose to the level of preventing a fair trial is waived because of its vagueness.

[**21]

I. Sufficiency of the Evidence

In Simmons' first issue on appeal, he contends that the evidence against him is not sufficient to support the trial court's guilty verdicts on the charges of kidnapping, sexual battery, and first-degree murder. "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001) (citing Banks v. State, 732 So. 2d 1065, 1067 n.5 (Fla. 1999)).

In this case, there was physical evidence and eyewitness testimony, as well as Simmons' statements, linking Simmons to Tressler at the time of the murder. We agree with the State that the jury, as the trier of fact, was entitled to draw an inference that Simmons was acknowledging guilt from his statement that he "must have did it." Therefore, this case is not entirely circumstantial. See Pagan v. State, 830 So. 2d 792, 803 (Fla.

2002) (stating that when the evidence in a case is "both direct and circumstantial, it is unnecessary [**22] to apply the special standard of review applicable to circumstantial evidence cases"). A confession constitutes direct evidence of guilt. Floyd v. State, 850 So. 2d 383, 406 (Fla. 2002) (citing Walls v. State, 641 So. 2d 381, 390 (Fla. 1994)).

Further, Mr. Rodriguez testified that Simmons was the last person seen with Tressler in the laundromat on the evening [*1112] of December 1, 2001. Eyewitnesses then saw Tressler trying to escape Simmons' car and screaming for help at the intersection of State Road 44 and County Road 437. Three eyewitnesses identified the car they saw on the night of December 1, 2001, as resembling a Chevrolet Corsica or Ford Taurus and possessing characteristics matching Simmons' car. There was blood spatter in Simmons' car and a large, degraded blood stain on the passenger seat. Tire track impressions taken from the area near where Tressler's body was discovered matched the two rear tires of Simmons' car, which were two different tire models. Simmons' semen was found in Tressler's vaginal washings. Dr. Gulino testified that Tressler's autopsy revealed extensive injuries to her anus not consistent with consensual anal sex. In light [**23] of these facts and circumstances, we conclude that there is sufficient evidence to find Simmons guilty of kidnapping, sexual battery, and first-degree murder. See Thomas v. State, 894 So. 2d 126, 131-32, 134-35 (Fla. 2004) (holding that a combination of direct eyewitness testimony, the defendant's confession, and circumstantial evidence that defendant continued to confine victim while intending to inflict harm because she was eventually sexually assaulted and murdered supported a conviction of kidnapping and first-degree murder), cert. denied, 544 U.S. 1003, 125 S. Ct. 1939, 161 L. Ed. 2d 779 (2005).

II. Jurisdiction and Venue

In his next issue on appeal, Simmons argues that the trial court erred in determining that it had jurisdiction to try Simmons

because the State admitted it had no knowledge of exactly where the crimes occurred. In contrast, the State points out that jurisdiction is distinct from venue, and a circuit court has jurisdiction to adjudicate a first-degree murder case. Further, the State notes that venue is sufficiently proven if the jury can reasonably infer from the evidence that the crime occurred in the county where the trial occurs. n13

> n13 The State correctly points out in its brief that Simmons' counsel adopts arguments made in the court below in her initial brief to this Court. This practice does not preserve an issue for review by an appellate court. See Duest, 555 So. 2d at 852 (stating that claims are deemed waived if a party merely makes reference to arguments made in a lower court).

[**24]

The circuit courts have exclusive original jurisdiction over all felonies. Art. V, § 5(b), Fla. Const.; § 26.012(2)(d), Fla. Stat. (2003). A person can be prosecuted in this state for a crime if the offense is committed either wholly or partly within this state. § 910.005(1)(a), Fla. Stat. (2003). Because a circuit court has original jurisdiction over felonies, including murder, we find that the trial court properly denied Simmons' motion to dismiss for lack of jurisdiction.

As to venue:

> Venue need not be established beyond a reasonable doubt. If the evidence raises a violent presumption that the offense was committed within the county, or if the evidence refers to localities and landmarks at or near the scene of the alleged offense, known or probably familiar to the jury, from which they may reasonably infer that the offense was committed in the county, it will be sufficient.

Lowman v. State, 80 Fla. 18, 85 So. 166, 167 (Fla. 1920). In this case, it could reasonably be inferred that the felonies were [*1113] committed in Lake County. The evidence in the trial court tended to show that eyewitnesses observed [**25] Tressler in Simmons' car screaming for help in Lake County on the night of December 1, 2001. Tressler's body was discovered in Lake County on the morning of December 3, 2001. While it is possible that the murder and sexual battery could have occurred in a different county, it is reasonable for a jury to infer that the crimes occurred in Lake County.

III. Simmons' Motion to Suppress Statements and Vehicle Evidence

Simmons argues that the trial court erred in refusing to suppress the statements he made to police because he did not voluntarily accompany authorities to the police station. Simmons also argues that the trial court improperly denied his motion to suppress the evidence law enforcement officers obtained from his vehicle. This Court has stated that "a suppression ruling comes to the reviewing court clad in a presumption of correctness as to all fact-based issues." State v. Glatzmayer, 789 So. 2d 297, 301 (Fla. 2001). Given the evidence before the trial court, we find no error.

A. Simmons' Statements

The trial judge denied Simmons' motion to suppress, determining that Simmons voluntarily submitted to the interrogation and, in the alternative, that the [**26] detectives had probable cause to detain Simmons for a custodial interrogation.

1. Voluntariness of the Interrogation

Simmons contends that, given the number of officers that surrounded his parents' Pine Lakes residence on December 7, 2001, a reasonable person in his position would not feel that he or she could decline the detectives' invitation to come to the

sheriff's office. Further, Simmons contends that the fact that he [*1114] was handcuffed and transported in the back of a caged, marked police cruiser belies the contention that he went voluntarily.

In support of his argument, Simmons cites to Hayes v. Florida, 470 U.S. 811, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985). In Hayes, police approached a burglary-rape suspect on his front porch and asked him to come to the police station for fingerprinting. Id. at 812. An investigator threatened to arrest the suspect if he did not comply. Id. The United States Supreme Court determined that Hayes' detention was not consensual, and it reversed the conviction and remanded the case because the police did not have probable cause to detain the suspect. Id. at 814, 817-18.

Unlike the defendant in Hayes [**27] , the uncontroverted testimony by the officers in this case indicates that Simmons never expressed any reluctance to accompany the detectives to the sheriff's office. The officers did not threaten Simmons with an arrest or try to coerce him in any way. These crucial factual differences distinguish Hayes from the present case.

Although Simmons contends that a "thundering herd" of police officers would render any reasonable person unable to refuse the detectives' invitation, the record shows that most of these officers were not directly involved in any confrontation with Simmons or the conversation between Simmons, Detective Adams, and Detective Purdue. These two detectives were not in uniform and were not armed when they conducted the initial interview at Simmons' parents' home. Moreover, although Simmons was handcuffed and transported in the back of a caged police cruiser, the State presented evidence that these measures were taken for the safety of the police officers involved and that police removed the handcuffs as soon as Simmons reached the sheriff's office. Nothing in the record indicates that Simmons objected to being handcuffed or at any time expressed a desire to terminate [**28] the encounter. Our recognition of the propriety

of using handcuffs in noncustodial encounters with police is in line with this Court's prior case law. See, e.g., Taylor v. State, 855 So. 2d 1, 18 (Fla. 2003) (holding that the use of handcuffs during a trip from a police cruiser to an interrogation room did not render a detention custodial when the suspect was told that he was not under arrest). Under the totality of the circumstances, we find no error in the trial court's determination that a reasonable person in Simmons' position would have felt free to terminate the encounter with police.

Simmons does not deny that he signed a Miranda waiver before the detectives began to interview him at the sheriff's office, and he never asked to terminate the interview. The two detectives allowed Simmons to use the bathroom when he needed to, and the three even ate dinner together. Moreover, the detectives told Simmons that they would provide a ride home if his family could not come to get him, and they reassured Simmons that he was not under arrest.

Given the significant deference that we give to trial courts' fact-finding on motions to suppress, we conclude that the trial [**29] court did not abuse its discretion when it accepted the evidence presented by the State and determined that Simmons' December 7 interview with detectives was voluntary under the totality of the circumstances.

2. Probable Cause

Even if Simmons was able to successfully argue that his detention was custodial and not voluntary, he would still have to show that the police detained him without probable cause in order to prevail. See Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984) (holding that the trial court properly denied defendant's motion to suppress evidence when there was probable cause to support his de facto arrest). In addition to finding that Simmons' encounter with detectives was voluntary, the trial court determined that the police had probable cause to detain Simmons.

We have stated that "[p]robable cause for arrest exists where an officer 'has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction.' " Chavez v. State, 832 So. 2d 730, 747 (Fla. 2002) (quoting Walker v. State, 707 So. 2d 300, 312 (Fla. 1997)). [**30] At the time of the interview, detectives had statements from Simmons' friends and acquaintances that indicated that he was Tressler's boyfriend and that he was the last person seen with Tressler while she was alive. They also had a statement from Mr. Rodriguez that he saw Simmons with Tressler between 10:30 p.m. and 10:45 p.m. on December 1, 2001. Moreover, Simmons' car matched the description of the car that two witnesses saw at about midnight on December 1, from which a woman matching the description of Tressler was attempting to flee. Detectives also had statements from witnesses that Simmons may have beaten Tressler earlier in the week, and they knew that he had previously been arrested for abusing a prior spouse or girlfriend.

This Court has stated that "[t]he existence of probable cause is not susceptible [*1115] to formulaic determination. Rather, it is the 'probability, and not a prima facie showing, of criminal activity [that] is the standard of probable cause.' " Doorbal v. State, 837 So. 2d 940, 952-53 (Fla. 2003) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). Considering the totality of the circumstances [**31] and the evidence presented in this case, we cannot say that the trial court abused its discretion when it found that any custodial detention of Simmons was supported by probable cause.

B. Evidence from Simmons' Vehicle

Simmons also challenges the trial court's denial of his motion to suppress evidence seized from his vehicle on December 7, 2001, under a search warrant. Simmons alleges that factual inaccuracies plague the affidavit that supported the magistrate's

decision to grant the search warrant. Simmons alleges that, after excising those portions of the affidavit that are inaccurate, the State is left with nothing upon which the magistrate could have found probable cause to authorize a search.

Deliberate falsity or reckless disregard for the truth in an affidavit that gives rise to a search warrant can, in some instances, lead to suppression of evidence obtained under that warrant. See Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). However, we have held that an erroneous statement will only invalidate a search warrant if, after excising the erroneous statement, the remaining true statements are insufficient to establish probable cause. [**32] See Terry v. State, 668 So. 2d 954, 958 (Fla. 1996). In the instant case, the trial court ruled that there were, in fact, no intentionally or recklessly false statements.

First, Simmons alleges that the affidavit provides an inaccurate description of Detective Brewer's qualifications by stating that Detective Brewer had been a law enforcement officer since 1979 because Detective Brewer's certification lapsed for twenty years while he pursued a career as an attorney. The record, however, indicates that Detective Brewer was a sworn officer at the time that he signed the affidavit and that his experience as an officer dated back to 1979. Further, although Detective Brewer's Florida certification did lapse during the 1980s, his certification as a military police officer continued during this period and never lapsed. Given this evidence, we conclude the trial court did not err in concluding that the portion of the affidavit regarding Detective Brewer's qualifications was not false.

Next, Simmons alleges that the affidavit misstates the information that detectives obtained from Ms. Renfro. Detective Brewer's affidavit indicates that a witness observed a woman who matched [**33] the description of the victim and was screaming and attempting to flee a white Chevrolet Corsica-type car. Simmons cites to Ms. Renfro's statement to the police, which

indicated that the woman that Ms. Renfro saw was in her mid-fifties, had short brown hair, and was wearing a white T-shirt. Because Tressler was actually forty-eight, had long black hair, and was wearing a grey shirt, Simmons argues that Ms. Renfro's description did not match the description of Tressler and that the affidavit is materially false.

However, as the trial court properly noted, Detective Purdue testified that Ms. Renfro positively identified Tressler's picture as the same woman she saw in the car. Therefore, despite the slight variations Simmons notes between Ms. Renfro's [*1116] description and Tressler's actual appearance, the trial court properly concluded that the portion of the affidavit regarding Ms. Renfro's description of Tressler was not misstated.

Next, Simmons alleges an inaccuracy in the portion of the affidavit that indicates that Detective Brewer personally observed several visible stains consistent with dried blood in the back of Simmons' vehicle. This is because the trial judge personally examined [**34] the sheet and found no blood. While there does appear to be an inconsistency between Detective Brewer's and the trial judge's observations of the sheet, the record does not refute Detective Brewer's testimony that he personally observed blood stains prior to preparing the warrant. The trial court found that the officer's observations and conclusions were not unreasonable considering the circumstances of the observations.

The trial court also noted that "[t]he observation of the blood-stained sheet may be superfluous under Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419" (1970), because "the initial Fourth Amendment intrusion was the seizure of the vehicle, and a proper analysis would be to review of [sic] the facts as they existed at that time." In Chambers, the United States Supreme Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a

> magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

399 U.S. at 52. [**35] We find no error in the rulings of the trial court.

Simmons further alleges that the testimony as to when Detective Brewer signed the affidavit and when the magistrate issued the search warrant indicates that Detective Brewer never saw the vehicle before signing the affidavit. The trial court acknowledged that although there was "some question as to when the affidavit and warrant were presented to the magistrate," the trial court did "not find the discrepancy in time [to be] any indication of untoward action on behalf of the Lake County[] Sheriff's Department." Considering the totality of the circumstances and the deference we give to the trial court regarding factual determinations, we find no error. Based on the analysis concerning Simmons' statements and the search of his vehicle, we also find no merit to Simmons' contention that the arrest of Simmons was the result of police misconduct.

IV. Testimony of Defense Expert in Eyewitness Identification

In his next issue on appeal, Simmons argues that the trial court erred in refusing to admit Dr. John Brigham's expert testimony concerning the psychological factors that contribute to erroneous witness identifications when law [**36] enforcement officers use suggestive techniques.

In Johnson v. State, 438 So. 2d 774 (Fla. 1983), this Court found no error in a trial court's refusal to allow such expert testimony:

> A trial court has wide discretion concerning the admissibility of evidence and the range of subjects

> about which an expert can testify. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L. Ed. 2d 1322 (1982); Johnson v. State, 393 So. 2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, [*1117] 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981). Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.

Id.at 777 (citation omitted). Subsequently, in McMullen v. State, 714 So. 2d 368 (Fla. 1998), this Court considered whether the same expert witness, [**37] Dr. Brigham, was improperly excluded as a witness when offering similar testimony. This Court concluded "that the admission of such testimony is within the discretion of the trial judge and that . . . the trial judge did not abuse that discretionary authority by refusing to allow the introduction of the expert testimony." Id. at 369. This Court stated in McMullen that Florida follows the "discretionary" view articulated in Johnson regarding the admissibility of expert witness testimony concerning the reliability of eyewitness testimony. Id. at 370-71. Dr. Brigham stated in his proffered testimony in the present case that he would testify at trial to issues similar to those in McMullen. Under our case law we conclude the trial judge did not abuse his discretion in disallowing Dr. Brigham's testimony.

V. State's Entomology Expert

Simmons next argues that because Dr. Hogsette, the State's expert in the life cycle of flies, was not qualified as a forensic entomologist, the trial court erred in allowing him to testify

regarding the approximate time of Tressler's death.

A trial judge has the discretion to determine if a witness's qualifications [**38] render him or her an expert, and this determination will not be overturned absent clear error. Johnson, 438 So. 2d at 777 (noting a trial court's wide discretion regarding evidence admissibility and expert testimony). We conclude that the trial court did not commit error in allowing Dr. Hogsette to utilize his knowledge of the life cycle of flies and relate this knowledge to the estimated time of Tressler's death. During trial, Dr. Hogsette testified concerning his experience in entomology and his involvement in other murder cases, stating that other courts had recognized him as an expert in the field of entomology and the life cycle of flies. He had worked on forensic cases since the 1970s, utilizing his expert knowledge in determining the age of corpses, and he explained that the work he has performed on flies involved the same principles that a forensic entomologist would use. Of course, there was also other evidence presented during trial, such as the eyewitness testimony of the events preceding the murder, that placed Tressler's death during the time period opined by Dr. Hogsette. We find that the trial court did not err in allowing Dr. Hogsette to testify.

VI. [**39] Identification of Tressler and Simmons' Vehicle

Next, Simmons claims the trial court erred in denying Simmons' motion to exclude or preclude the identification of Simmons' vehicle. n14 He argues that the procedures [*1118] used to identify Simmons' vehicle and Tressler were unnecessarily suggestive because Ms. Renfro was shown only one photograph and one vehicle to identify Tressler and Simmons' vehicle, and Mr. Montz was shown only one vehicle over a year after he first viewed it to identify Simmons' vehicle. n15

n14 Simmons' brief states that arguments made at the trial court level regarding Simmons' motion to suppress are incorporated by reference into his brief on this appeal.

"Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Duest, 555 So. 2d at 852. Therefore, any arguments not expressly included in Simmons' brief to this Court are not considered in this appeal.

n15 Initially, we reject Simmons' arguments that Ms. Renfro's and Mr. Montz's identifications violated Simmons' Sixth Amendment right to counsel. Under Powell v. Alabama, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158 (1932), defendants have a right to counsel at critical stages of their cases, including the time between arraignment and the beginning of trial. As the trial court noted and the State argues to this Court, the two cases Simmons cites for his proposition, United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967), both involved defendants participating in post-indictment lineups. In Simmons' case, Simmons did not participate in the identifications of Tressler or his vehicle. In fact, Ms. Renfro's identification of Tressler's photograph occurred before Simmons was arrested.

[**40]

"The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." Grant v. State, 390 So. 2d 341, 343 (Fla. 1980) (citing Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). In Grant, this Court held that "a suggestive confrontation procedure, by itself, is not enough to require exclusion of the out-of-court identification; the confrontation evidence will be admissible if, despite its suggestive aspects, the out-of-court identification possesses certain features of

reliability." 390 So. 2d at 343 (citing Manson v. Brathwaite, 432 U.S. 98, 110, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Therefore, the test for whether a suggestive identification procedure should be excluded has two prongs: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; [and] (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." Id.

In Neil, the United States Supreme Court held that the factors a court should consider to [**41] determine the likelihood of misidentification include

> the opportunity of the witness to view [the person or object] at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the [person or object], the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200. These factors have often been applied to cases involving the identification of defendants, see, e.g., Fitzpatrick v. State, 900 So. 2d 495, 518 (Fla. 2005), and this Court has held that these factors also apply to the identification of physical evidence. Dennis v. State, 817 So. 2d 741, 760 (Fla. 2002) ("The factors to be considered in the determination of whether the identification of the vehicle was reliable are all comparable to factors considered in a witness's identification of a suspect."); Pittman v. State, 646 So. 2d 167, 171 (Fla. 1994) (holding that the Neil factors applied to identification of the defendant's wrecker).

We agree with Simmons that the methods employed by [**42] law enforcement in this case were highly suggestive because only [*1119] one photograph and one vehicle were shown to witnesses, resulting in an affirmative answer to the first

prong of the out-of-court identification analysis. See Washington v. State, 653 So. 2d 362, 365 (Fla. 1994) (holding that "the showing of a single photo [is] unduly suggestive"); Way v. State, 502 So. 2d 1321, 1323 (Fla. 1st DCA 1987) (stating that the "use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances"). However, we find no error in the rulings of the trial court that, considering the totality of the circumstances, the procedures did not "give rise to a substantial likelihood of irreparable misidentification," and we answer the second prong of the out-of-court identification analysis in the negative concerning both Ms. Renfro's and Mr. Montz's identifications.

A. Ms. Renfro's Identifications of Tressler and Simmons' Vehicle

Ms. Renfro testified at trial that she saw a white car slow down at a red light when a woman tried to climb out, screaming, "Help me, help me, please." She stated [**43] that the woman looked directly at her with fear in her eyes. As Ms. Renfro approached the car, yelling at the driver to stop, the car sped off, and she got in her van and chased after the car until she lost the car. Ms. Renfro testified that she thought the car was a Chevrolet Corsica, but she didn't "really know [her] cars too well, just the body style reminded [her] of a Corsica." On December 4, 2001, three days later, Ms. Renfro wrote a statement describing the events and people she had witnessed, stating that the woman she saw was an older woman with "shorter, pinned up" brown hair and a white T-shirt. That same day, Detective Perdue showed her one picture of Tressler, which she was able to identify right away. Six days later, on December 10, Ms. Renfro met Detective Perdue at the sheriff's office to view a car parked in the sallie port, which she identified as the car she had seen on the night of December 1. She testified at the hearing that she was sure it was the same car because of the flag on the side window, a patriotic sticker in the rear window, and the car's blue interior.

Based on these facts, we agree that showing Ms. Renfro one picture of Tressler and one vehicle [**44] was "unduly suggestive." See Washington, 653 So. 2d at 365.

> However, . . . a pretrial identification obtained from suggestive procedures is not per se inadmissible, but may be introduced into evidence if "found to be reliable and based solely upon the witness' independent recollection . . . at the time of the crime, uninfluenced by the intervening illegal confrontation."

Id.(quoting Edwards v. State, 538 So. 2d 440, 442 (Fla. 1989)). Ms. Renfro had an abundance of time and good lighting conditions to view the victim and the car. She also gave written descriptions of Tressler and the vehicle she saw the night of December 1 before viewing the single photograph of Tressler or Simmons' vehicle in the sallie port. Because of the timing of the descriptions, we find no error in the trial court's conclusion that they were the result of Ms. Renfro's independent recollection, "uninfluenced by the intervening illegal confrontation." Id. We further conclude, using the Neil factors, that Ms. Renfro had adequate opportunity to view the woman and car she saw on the night of December 1; her descriptions were sufficiently accurate; she was [**45] certain of what she saw on the night of December 1; and [*1120] the length of time between the crime and her identifications was only a matter of days. Therefore, any discrepancies between Ms. Renfro's descriptions and what Tressler and Simmons' car actually looked like, such as Simmons' claim that Ms. Renfro's description of Tressler's hair was inaccurate, "were the proper subject of cross-examination, but not sufficient to amount to a bar to admissibility." Dennis, 817 So. 2d at 761.

B. Mr. Montz's Identification of Simmons' Vehicle

Mr. Montz's identification of Simmons' vehicle did not occur

until a year after he initially described to Detective Perdue the car he witnessed, when Detective Perdue showed him a videotape of Simmons' car. Mr. Montz then identified the car without any hesitancy or uncertainty, and stated that he was sure it was the same car because of its color, the number of doors, the spoked rims, the amount of dirt, and its two dents. He also recalled the flag hanging from the car's window. n16 The trial court found that when applying the Neil factors, the lapse in time between when Mr. Montz initially saw the car and when he was able to identify it [**46] would "weigh in favor of finding that there [was] a substantial likelihood of misidentification." However, the trial court held that after examining the totality of the circumstances, there existed no substantial likelihood for misidentification.

> n16 Simmons argues that Mr. Montz stated that the vehicle he identified was the same vehicle as the one he witnessed a year earlier, except for the dents, dirt, wheels, and trim. However, the record states that Mr. Montz was sure it was the same car because of its color, the number of doors, the spoked rims, the amount of dirt, and its two dents.

First, as with Ms. Renfro, we conclude that Detective Perdue's showing Mr. Montz a videotape of only one vehicle constituted an unduly suggestive identification procedure under the first prong of the out-of-court identification analysis. Further, we agree with the trial court that the length of time that passed between Mr. Montz's first viewing of the car and his identification of it a year later could result in a [**47] substantial likelihood of misidentification.

However, considering the other Neil factors, we conclude that the trial court did not err in finding that Simmons has not satisfied the second prong of the test for whether a suggestive identification should be excluded. First, Mr. Montz had an

adequate opportunity to view the car the night he witnessed it because the area was well lighted and there was nothing blocking his view. Second, Mr. Montz's degree of attention was high, judging from the accuracy of his description of the car, and his level of certainty was high as well.

VII. The Constitutionality of Florida's Death Penalty Statute

In his next issue on appeal, Simmons argues that Florida's death penalty statute, section 921.141, Florida Statutes (2003), is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). We have previously addressed this contention on direct appeal and have concluded that there is no basis for declaring Florida's statutory scheme facially unconstitutional. See, e.g., Lawrence v. State, 846 So. 2d 440, 451 (Fla. 2003), cert. denied, 540 U.S. 952, 124 S. Ct. 394, 157 L. Ed. 2d 286 (2003); [**48] Butler v. State, 842 So. 2d 817, 834 (Fla. 2003). Further, in this case, by use of a special interrogatory verdict, the jury expressly [*1121] and unanimously found all of the aggravating factors later relied upon by the trial court to impose a death sentence. See Ring, 536 U.S. at 609 (finding that the Sixth Amendment right to a jury trial precludes a procedure by which a sentencing judge alone and without a jury finds aggravating factors sufficient to invoke the death penalty); see also Everett v. State, 893 So. 2d 1278, 1282 (Fla. 2004) (rejecting the defendant's Ring claim because the jury unanimously recommended death, and one of the aggravating factors was that the murder was committed during the course of a sexual battery or burglary, crimes of which the jury also found the defendant guilty), cert. denied, 544 U.S. 987, 125 S. Ct. 1865, 161 L. Ed. 2d 747 (2005); Caballero v. State, 851 So. 2d 655, 663-64 (Fla. 2003) (rejecting a Ring claim on direct appeal where one of the aggravating circumstances the judge considered was that the defendant committed the murder during the commission of a burglary [**49] and kidnapping).

VIII. Aggravators

In his final argument on appeal, Simmons argues that the trial court erred in finding the evidence sufficient to establish three aggravators of a prior violent felony, the murder being committed during the course of kidnapping and sexual battery, and HAC.

A. Previous Felony Conviction Involving the Use or Threat of Violence to the Person

Simmons had previously been convicted of aggravated assault on a law enforcement officer. Further, section 921.141(5)(b), Florida Statutes (2001), states that an assault involving the threat of violence qualifies as an aggravating factor for purposes of imposing the death penalty. The probable cause affidavit from that case was read to the jury during the penalty phase of this case, and it stated that Simmons' car appeared to deliberately veer into oncoming traffic, forcing a police officer to drive completely off the road to avoid a head-on collision. Simmons argues that because his prior conviction involved a drunk driving incident in which a police officer only thought that Simmons was swerving at him, there was no intent involved and, therefore, this conviction cannot be considered [**50] an aggravating factor. However, according to the probable cause affidavit introduced into evidence, Simmons' actions caused the officer to feel threatened and to take evasive measures to avoid a head-on collision. Based on this evidence, the penalty phase jury found that the State proved this aggravating circumstance. Similarly, we conclude that this previous felony conviction was found as an appropriate aggravating factor.

B. Murder Was Committed During the Commission of or Attempted Commission of Kidnapping and Sexual Battery

Simmons next argues that the evidence does not support the finding that the murder occurred during the commission of kidnapping and sexual battery. Simmons was found guilty during the guilt phase of kidnapping and sexual battery using force likely to cause serious injury based on the evidence of sexual

injury found on the victim's body. These facts, coupled with the eyewitness testimony placing Tressler in Simmons' car screaming for help the night of December 1, 2001, constitute substantial competent evidence to support the trial court's finding that Simmons committed the murder while engaged in a kidnapping [*1122] and sexual battery under section 921.141(5)(d), Florida Statutes [**51] (2001).

C. HAC

The HAC aggravator applies "only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Rose v. State, 787 So. 2d 786, 801 (Fla. 2001) (quoting Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998)). Further, this Court has previously "upheld HAC in beating deaths" presenting similar circumstances to those involved herein. Lawrence v. State, 698 So. 2d 1219, 1222 (Fla. 1997); see also Dennis, 817 So. 2d at 766 (trial court's finding of HAC was supported by evidence that the victims suffered skull fractures as the result of a brutal beating and that the victims were conscious for at least part of the attack); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (trial court's finding of HAC was supported by evidence that the victim was struck seven times in the head and the medical examiner testified that the victim was alive at the time of the infliction of most of the wounds); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) [**52] (trial court's finding of HAC was supported by evidence that victim was brutally beaten while attempting to fend off blows to the head before he was fatally shot).

In this case, Simmons argues that because it is possible that the first blow to Tressler's head rendered her unconscious, HAC should not apply. However, Dr. Gulino, the medical examiner, described numerous wounds that, in his opinion, were inflicted prior to Tressler's becoming unconscious. Further, Tressler suffered approximately twenty-five defensive wounds and other

nonfatal stab wounds and blunt trauma injuries. Additionally, Dr. Gulino unequivocally stated that the injury to Tressler's anus occurred prior to her death because of the extensive bruising and laceration. Also, Ms. Renfro testified that Tressler appeared terrified when she saw her in Simmons' car the night she was last seen. Based upon all of this evidence, we uphold the trial court's finding of HAC as an aggravating circumstance.

IX. Proportionality

The Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). [**53] "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.' " Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases. See Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998). However, this proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990))

In this case, the trial court found three aggravating circumstances: (1) A previous conviction of a felony involving the use or threat of violence to a person; (2) the murder was committed in the course of a kidnapping and sexual battery; and (3) HAC. The court found no statutory mitigators, but did find several nonstatutory mitigators that were given either some or minimal weight. This Court has stated [*1123] that HAC is one of the most serious aggravators in the statutory [**54] sentencing scheme. See Morton v. State, 789 So. 2d 324, 331 (Fla. 2001); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Recently, in Boyd v. State, 910 So. 2d 167 (Fla. 2005), cert. denied, 126 S. Ct. 1350, 164 L. Ed. 2d 63 (2006), this Court concluded that the death penalty was proportionate where the

trial court considered and weighed two aggravating factors (HAC and that the murder was committed while the defendant was committing or attempting to commit kidnapping and sexual battery) against one statutory mitigator (that the defendant had no significant prior criminal history, which the trial court afforded medium weight) and five nonstatutory mitigators (including that the defendant came from a good family and showed remorse for his actions). See also Dessaure v. State, 891 So. 2d 455, 472-73 (Fla. 2004) (death sentence was proportionate where, although the rape kit was negative, the defendant inflicted a total of fifty-three wounds, including multiple lethal stab wounds to the torso and neck; the trial court found that the aggravators of a previous conviction of a violent felony, prior felony [**55] conviction, that the murder was committed during a burglary, and HAC outweighed the "age" statutory mitigator and the nonstatutory mitigating factors of caring parents, family background, capacity to form personal relationships, and behavior in court). In light of the totality of the circumstances of this case as compared to the facts of other capital cases, we find the death penalty to be proportionate.

CONCLUSION

For the reasons expressed above, we affirm Simmons' convictions and sentences, including the sentence of death.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, CANTERO, and BELL, JJ., concur.

PARIENTE, C.J., specially concurs with an opinion, in which ANSTEAD and CANTERO, JJ., concur.

WELLS, J., concurs with an opinion.

BELL, J., specially concurs with an opinion.

QUINCE, J., concurs in result only.

CONCUR BY: PARIENTE

CONCUR: PARIENTE, C.J., specially concurring.

I concur in the majority opinion, but write separately on Issue IV, which concerns the exclusion of expert testimony on eyewitness identifications. Twenty-three years ago, this Court, addressing one of six guilt-phase claims in a capital appeal, issued what has become the seminal [**56] opinion on this issue in Florida. Applying an "abuse of discretion" review standard, we affirmed the exclusion of expert testimony on the reliability of eyewitness identification. See Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983). We stated:

> A trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify. Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.

Id. (citations omitted).

In so holding, we signaled to trial judges that expert testimony in this area is unnecessary [*1124] because the assessment of eyewitness identification is within the common experience of jurors. With one exception, in every case since Johnson in which we have addressed this issue, the trial courts excluded expert testimony on the factors affecting eyewitness identification [**57] testimony, and this Court affirmed, relying on the final sentence from Johnson excerpted above, either alone or within the longer passage. See McMullen v. State, 714 So. 2d 368, 370 (Fla. 1998); Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990); Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985). In

addition, this Court relied on the determination in Johnson that juries do not need "the aid of expert testimony" to assess eyewitness identification testimony in affirming the refusal of the trial court to authorize payment of costs for an indigent defendant to retain an expert. See Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991), rev'd on other grounds, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). In the one case reviewed by this Court in which expert testimony in this area was admitted, we summarily upheld the trial court's limitation on its scope, again relying on Johnson. See Rogers v. State, 511 So. 2d 526, 530 (Fla. 1987).

In the years that have passed since we stated our belief in 1983 that jurors can accurately assess eyewitness identifications without the aid of expert [**58] testimony as they do most other evidence, we have learned that quite the opposite is often true. For example, common sense would lead us to believe that greater certainty by an eyewitness in making an identification corresponds to greater accuracy. Yet research shows that a witness's degree of certainty correlates weakly, at best, with the accuracy of the identification. See Elizabeth Loftus & James Doyle, Eyewitness Testimony: Civil and Criminal § 3-12, at 67 (3d ed. 1997) ("The consensus of the literature that deals with [whether eyewitness confidence is an indication of eyewitness accuracy] seems to indicate that eyewitness confidence is not a very good indicator of eyewitness accuracy."). In fact, the "certainty an eyewitness expresses in his identification can be a misleading indicator of the identification's accuracy." Gary L. Wells, Eyewitness Identifications: Scientific Status, in Science In the Law: Social and Behavioral Science Issues 391, 412 (David L. Faigman et al. eds., 2002). Other features of eyewitness unreliability, such as difficulty identifying persons of another race, have also become well established. See Loftus & Doyle, supra, § 4-9, at [**59] 86; Wells, supra, at 404. A 2002 report by the Illinois Governor's Commission on Capital Punishment reflects that "[t]he fallibility of eyewitness testimony

has become increasingly well-documented in both academic literature and in courts of law." Report of the Governor's Commission on Capital Punishment 31 (2002), available at http://state.il.us/defender/report.pdf. Similarly, the North Carolina Actual Innocence Commission organized by Chief Justice I. Beverly Lake, Jr., of the North Carolina Supreme Court "chose eyewitness identification as its first topic of study because research has identified misidentification as the leading factor in the wrongful conviction of those exonerated nationally by DNA evidence." Christine C. Mumma, The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause, 52 Drake L. Rev. 647, 652 (2004).

Section 90.702, Florida Statutes (2005), titled "Testimony by experts," provides:

> If scientific, technical, or other specialized knowledge will assist the trier of [*1125] fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert [**60] by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Focusing on this provision, Justice Anstead wrote separately in McMullen to urge trial courts to admit expert testimony on eyewitness identifications when such testimony would be helpful to the jury:

> In this case I would approve of the discretionary use of expert testimony about psychological factors that may affect eyewitness identification . . . to give effect to the intent expressed in section 90.702. Further, . . . while the question of admissibility of such expert testimony should be left to the sound discretion of the trial judge, I would attach the . . . caveat that the trial judge must exercise his or her

> discretion in furtherance of section 90.702's "helpfulness" standard. In considering a proffer of such evidence the trial court should be aware that it has the discretion to admit the evidence. It should be careful in assessing the qualifications of the expert presented as well as in making an evaluation of the helpfulness of the proffered testimony compared to the risk that [**61] it may cause juror confusion.

714 So. 2d at 380-81 (Anstead, J., concurring in part and dissenting in part).

Since McMullen, several courts have recognized that the research results fall outside common assumptions about eyewitness identification testimony. For example, in United States v. Mathis, 264 F.3d 321, 340-42 (3rd Cir. 2001), the United States Court of Appeals for the Third Circuit concluded that the jury would have been illuminated by proffered expert testimony concerning the effect of prior viewings of a suspect's image, the poor correspondence of a witness's confidence to the reliability of an identification, and the effect of weapon focus. The Third Circuit concluded that "testimony of this sort, with its accompanying level of scientific detail, would not simply duplicate jurors' intuitions or common sense, and such principles seem difficult to establish indirectly through cross-examination." Id. at 341. For this reason, Mathis held that the trial court abused its discretion in excluding expert testimony on the "double identification" effect, as well as on the relationship between eyewitness confidence and [**62] accuracy and the effect of the presence of a weapon on accuracy. Id. at 341-42.

Similarly, the United States Court of Appeals for the Sixth Circuit, applying an abuse of discretion standard, ruled that a trial court erred in excluding expert testimony on eyewitness identifications without first determining whether the testimony would be helpful to the jury. See United States v. Smithers, 212

F.3d 306, 315 (6th Cir. 2000). The court stated that the trend in favor of admission of expert testimony is "not surprising in light of modern scientific studies which show that, while juries rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances." Id. at 311-12. The Sixth Circuit cited a "plethora" of authorities supporting this view, including one suggesting that "'jurors are unaware of several scientific principles affecting eyewitness identifications' . . . [and], because many of the factors affecting eyewitness impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong." Id. at 312 n.1 (citation omitted) (quoting Roger V. Handberg, [**63] Expert Testimony on Eyewitness [*1126] Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1022 (1995)).

In Smithers, the Sixth Circuit held that expert eyewitness identification testimony "should be admitted . . . when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications." 212 F.3d at 317. The Georgia Supreme Court has reached a similar conclusion:

> Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification.

Johnson v. State, 272 Ga. 254, 526 S.E.2d 549, 552-53 (Ga. 2000) (footnote omitted).

Mistaken identity is the chief cause of wrongful convictions.

See Edward Connors et al., Convicted by Juries, Exonerated by [**64] *Science: Case Studies in the Use Of DNA Evidence to Establish Innocence After Trial* (1996) (finding that twenty-four out of twenty-eight cases of postconviction exoneration based on DNA testing were due in great part to mistaken eyewitness identifications); Connie Mayer, Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays, 13 Pace L. Rev. 815, 819 (1994) ("[S]tudies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness identification evidence."). By bringing to light research findings on factors affecting an eyewitness identification, expert testimony can assist the trier of fact, the criterion for admission of expert testimony under section 90.702.

Our decision in Johnson does not bar the introduction of expert testimony on eyewitness identifications. It is now clear that such testimony can assist the jury in assessing guilt in certain cases, especially where, as some courts have recognized, the only inculpatory evidence is eyewitness testimony. Accordingly, I encourage trial courts to truly exercise their discretion as to the admission of this testimony. Trial judges [**65] should consider, as they do with other expert testimony, whether the testimony would assist the jury, i.e., whether it would introduce relevant considerations as to accuracy that could not otherwise be brought to light via cross-examination, jury instructions, or the jurors' common sense. As the research demonstrates and courts increasingly recognize, expert testimony in this area can be a powerful tool in helping the criminal justice system achieve its goal of convicting the guilty while acquitting the innocent.
ANSTEAD and CANTERO, JJ., concur.
WELLS, J., concurring.

I concur in the majority opinion. I write separately to comment upon Chief Justice Pariente's concurring opinion in respect to expert opinion on eyewitness identification, with which I do not agree.

Rather, I agree with the decision in United States v. Smith, 122 F.3d 1355 (11th Cir. 1997), approving United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). In Thevis, the court stated that "[t]o admit such testimony in effect would permit the proponent's witness to comment on the [*1127] weight and credibility of opponents' witnesses and open the door to a barrage of marginally [**66] relevant psychological evidence." Id. at 641. I have additional serious concerns about what makes a person a qualified expert who can present testimony about whether a particular eyewitness is reliable. Furthermore, it is my view that expert testimony on the general credibility of eyewitness testimony only serves to cast general doubt as to witnesses not relevant to the specific situation of a particular trial. Again, as the court said in Thevis, "the problems of perception and memory can be adequately addressed in cross-examination and . . . the jury can adequately weigh these problems through common-sense evaluation." Id.

Moreover, such testimony in Florida courts would have to be Frye n17 tested, similar to what we required in Hadden v. State, 690 So. 2d 573 (Fla. 1997). Frye testing raises additional questions. How is such an expert's opinion peer reviewed? How does the opinion become generally accepted? What is the relevant scientific community?

> n17 Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

[**67]

An excellent summary of the case law on this subject is gathered in Challenge to Eyewitness Identification Through Expert Testimony, 35 Am. Jur. Proof of Facts 3d 1 (1996 & Supp. 2005), by The Honorable D. Duff Mckee.

BELL, J., specially concurring.

I agree with Justice Pariente that there is no per se rule of law

against the admission of eyewitness expert testimony. I also agree with her that guidance should be given to trial courts on how to exercise their discretion in deciding whether to admit such testimony. In an effort to provide tangible guidance, I offer four guiding principles and five factors a trial court should consider when determining whether or not eyewitness expert testimony should be admitted in any particular criminal case. n18

n18 I draw these principles and factors from Florida law as well as from the synthesis of case law from across this nation by The Honorable D. Duff McKee in his excellent article, Challenge to Eyewitness Identification Through Expert Testimony, 35 Am. Jur. Proof of Facts 3d 1 (1996 & Supp. 2005). As does Justice Wells, I commend Judge McKee's work to any judge or trial attorney confronting this important question.

[**68]

Four Guiding Principles

1. Whether to allow expert testimony on the issue of eyewitness identification is left to the sound discretion of the trial judge.

2. As with other witnesses, evaluating the credibility and reliability of eyewitnesses is generally for the jury to determine, without the help of eyewitness experts. Effective cross-examination, presentation of contradictory evidence, sound argument of counsel, and jury instructions are all effective, efficient and generally sufficient means of assisting the jury in properly fulfilling its critical function as fact-finder.

3. Expert testimony on eyewitness identification will be necessary in very limited circumstances.

4. If eyewitness expert testimony is deemed necessary, it must be "Frye-tested." n19 The expert's opinion must rest upon research and principles that are generally accepted in the relevant scientific community.

n19 Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). "Florida courts follow the test set out in [Frye]." Castillo v. E.I. Du Pont de Nemours & Co., Inc., 854 So. 2d 1264, 1268 (2003)). "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." Id. (quoting Hadden v. State, 690 So. 2d 573, 576 (Fla. 1997)). "We have recently defined 'general acceptance' to mean acceptance by a clear majority of the members of the relevant scientific community, with consideration by the trial court of both the quality and quantity of those opinions." Hadden, 690 So. 2d at 576 n.2 (citing Brim v. State, 695 So. 2d 268 (Fla. 1996).

[**69]

[*1128] **Factors to Consider in a Particular Case**

If all of the following factors are present in a particular case and the expert testimony is deemed admissible under Frye, the testimony should be admitted if:

(a) Identification of the defendant is a critical, disputed issue in the case; and
(b) The state's case essentially rests upon the credibility of eyewitness testimony; and
(c) There is little or no other evidence to independently establish that the defendant is the person who committed the crime; and

(d) The expert testimony addresses a specific circumstance of the eyewitness identification and provides a particularized explanation which will assist the jury in sorting out the facts; and
(e) The defendant maintains that he was not present when the offense was committed and advances an alibi.

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR LAKE COUNTY, FLORIDA

STATE OF FLORIDA,

v. Case No.: 01-CF-2577

ERIC L. SIMMONS,

Defendant.
_____/

ORDER DENYING MOTION TO SUPPRESS DEFENDANT'S STATEMENTS

This matter came on for evidentiary hearing on the Defendant's three motions to suppress on the following four dates: January 10, 2003; February 5, 2003; February 14, 2003; and March 12, 2003. The Court has read the motions and attachments thereto, considered the testimony presented and has read the complete transcripts from the four days of hearing, heard the argument of counsel, considered the authority submitted and cited by counsel, and has been otherwise fully advised in the premises.

The thrust of the Defendant's Motion to Suppress Statements is that the circumstances surrounding the Lake County Sheriff's Office's detectives' request for Mr. Simmons to accompany them to the Sheriff's Office for a consensual interview were so intimidating that the interview was not voluntary on Mr. Simmons part. If the Court were to accept the Defendant's position that the interview conducted at the Lake County Sheriff's Office was a custodial interrogation, the functional equivalent of an arrest, then the relevant inquiry would become whether or not law enforcement had probable

cause to detain the Defendant.[1] Thus, the Court has reviewed the testimony presented to determine 1) whether the Defendant was restrained to point of being effectively under arrest, and, if so; 2) whether there was probable cause to arrest the Defendant. For ease of reference, the Court has reviewed the transcribed testimony and cites to the record as follows: TI references the hearing transcript of January 10,2003; T2 references the hearing transcript from February 5,2003; T3 references the hearing transcript of February 14,2003, and T4 references the hearing transcript of March 12, 2003.

Detective Purdue of the Lake County Sheriff's Office was the lead investigator on a case involving the homicide of Debbie Tressler. He testified to the events leading up to and culminating in the Defendant's arrest. The body of Deborah Tressler was found late on the morning of Monday, December the 3rd, 2001. (T1 at page 32.) Monday was more or less spent attempting to identify the victim and to identify the cause of death. (T1 at page 34.) The victim was identified by her fingerprints on Tuesday morning. (T1 at page 35.) The investigation began on Tuesday with officers locating the victim's address, a trailer in Sorrento, and her place of employment, a laundromat in Sorrento. (T1 at page 35.) Through the following days, the officers spoke to witnesses who knew the victim and the witnesses described the physical attributes of the victim's boyfriend. (T1 at page 36.) They described the boyfriend's height, weight, color of hair, color of eyes, and that he drove a white car. (T1 at page 36.) One

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[1] Although it is the position of the Sheriff's detectives and the State that the Defendant was not under arrest, the detectives had taken an extra precaution of telling the Defendant of his constitutional right to remain silent and his right to counsel. Additionally, the Defendant was read and asked to sign a formal written Waiver of his Miranda rights. The document was entered into evidence as State's Exhibit two to the hearing conducted January 10, 2003, and Detective Purdue testified to the reading of the Miranda warning and the signing of the waiver at pages 55-57 of the hearing transcript. The Defendant has raised no argument as to the validity of the administration of the Miranda warning, nor has he raised any argument that he invoked his right to remain silent or be assisted by counsel during the interview prior to his arrest.

witness described the car as a white Ford Taurus with a black stripe or black molding down the side. (T1 at page 36.) The officers were interested in this boyfriend because one witness, Susan Vela, and her son Jose Rodriguez, said the victim had been in an altercation with her boyfriend the Thursday or Friday before the homicide. (T1 at page 37.)

One witness, a young man who worked at a mower shop, thought he had met the victim's boyfriend at a bar. (T1 at 41.) When speaking of the encounter, the witness said the man he was talking to asked, "Have you ever been in jail? You look familiar." The witness remembered the man's first name was Eric. (T1 at 41.)

The police had some information that the boyfriend may have been in jail. Based upon this information, the police collected a series of inmate release photographs and showed them to some of the witnesses, but the witnesses could not identify the man they knew as Debbie Tressler's boyfriend. (T1 at 41.) The original batch of photographs was of prison releasees with blond hair and blue eyes and did not include the Defendant. (T1 at 42.) Later in the week, when the police had the name "Eric," they increased the search of photographs and the second batch of approximately 60 photographs included the Defendant's picture. (T1 at 42.) The second batch of photographs was shown to Jose Rodriguez. He positively identified the Defendant as the man he saw with the victim the last time he saw Deborah Tressler alive, Saturday, December 1, 2001 between 11:30 p.m. and midnight. (T1 at 38, 46 and 47.) Three witnesses identified the Defendant from that second batch of photographs.

Once the police had the name Eric Simmons and a positive identification, they ran a background check and determined he had been arrested for abusing a former spouse or girlfriend. (T1 at 48.) They also located rental address for Eric Simmons, 1306 Stowe Avenue in Mount Dora. (T1 at page 45.) Neighbors were interviewed and said they had seen the white car, the victim and the Defendant at that address on numerous occasions, including the Saturday night Debbie Tressler was last

seen alive. (T1 at page 45.) The police also ran auto track on Eric Simmons and discovered a Ford Taurus was registered to the Simmonses. (T4 at page 43.)

Law enforcement also thought another incident that had been reported in Sorrento might be related to the homicide. On the Saturday night, December first, near midnight, witnesses advised that they were at the parking lot of a Circle K convenience store at the intersection of Route 437 and Route 44. (T1 at page 38.) This intersection is a little more than three miles from the laundromat. (T1 at page 44.) These witnesses identified a white car pulling up to a red light and a woman trying to escape the car through the front passenger's door and screaming for assistance. (T1 at page 38.) One witness tried to help the lady in the car and identified the lady by physical stature and saw her face. (T1 at page 39.) This witness, Sherri Renfro, at a later interview, after the homicide victim had been identified, was shown a single picture of Debbie Tressler and identified the woman in the picture as the same woman she had seen trying to escape from the car on Saturday night. (T1 at page 39.) Detective Purdue related that, according to the witness, the woman in the car was screaming, "Please help me," and as she tried to get out, the witness said the driver of the vehicle, described as a large white male, reached over and grabbed the victim by the clothing, pulled her into the car and accelerated through the traffic light. (T1 at page 40.) Detective Purdue testified that the witness described the car as a white vehicle with a black stripe down the side, possibly molding, and that it was a four-door Corsica-type vehicle, but said she was not sure of the make and model. (T1 at page 40.)[2]

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[2] Much argument has been presented by both the Defendant and the State regarding the car described by this witness, Sherri Renfro. The written statement provided by Ms. Renfro states: "I Sherri Renfro on 12-2-2001 at around midnite [sic] while standing at the pay phone at Circle K on the corner of 437 and 44 witnessed a white 4 door car I believe was a Corsica pull up to the lite [sic] at that intersection." Defense counsel has taken the position that this statement was an unequivocal identification of a Corsica. Detective Purdue has testified that the witness was not completely sure of

The preceding information was known to the officers **before** they made contact with the Defendant at his parents' home in Pine Lakes on Friday, December 7, 2001. Detective Purdue testified to the nature of the encounter with the Defendant at his parents' residence on January 10, 2003. However, a discrepancy in what Detective Purdue testified to regarding the Defendant being handcuffed, and information that had previously been provided in a deposition of one of the other officers, prompted the Assistant State Attorney to investigate and clarify what transpired at the Pine Lakes residence. A subsequent hearing was held February 5, 2003, (T2), to expound on this point, and additional testimony was also elicited on February 14, 2003, (T3) regarding the Defendant being handcuffed.

According to Detective Purdue, he and Detective Adams originally went to the residence in Pine Lakes that had been identified as Eric Simmons' parents' residence on the afternoon of December 7, 2001. (T1 at page 50.) Mr. Simmons' car, a white 1991 four-door Ford Taurus, was present, but Mr. Simmons was not so the detectives left and were en route to the Stowe Avenue, Mount Dora address. (T1 at page 50.) While driving to Mount Dora, the detectives were called via radio and advised that Eric Simmons had arrived at the residence in Pine Lakes. (T1 at page 50.) The testimony showed that the detectives were the last to arrive back at the Pine Lakes residence and that many other officers, between fifteen and thirty, had already arrived at the residence when the Defendant arrived. (T1 at page 70; T3 at page 13.) Additionally, a helicopter was flying overhead for surveillance. (T3 at page 28; TI at page 70.)

Other officers, about ten or fifteen of them including Captain Gregory and Major Gnann, had gone to the Defendant's

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the make and model, but that it was a Corsica-type vehicle. Neither party called Ms. Renfro to the stand to ask her what she meant in her statement. Detective Purdue has repeatedly testified that the Chevy Corsica and Ford Taurus are similar in design. (T4 at pages 30-33.)

uncle's home. (T3 at page 5.) The officers were looking for Eric. His uncle, Larry Dean Simmons, told them Eric worked with his dad, and then gave them directions to Eric's father's property. (T3 at page 7.) Eric's father, Terry Simmons is Larry Simmons' brother. (T3 at page 5.) The officers and Larry Simmons went to the property in Pine Lakes. Eric Simmons and his father were not on the property when the officers and Larry Simmons arrived. (T3 at page 8.) Eric Simmons then arrived at the residence driving an ATV. (T1 at page 50.) He was accompanied by his father who was on a tractor. (T1 at page 50.) Detectives Purdue and Adams had advised the officers present **not** to arrest Eric Simmons or do anything to him, just to leave him alone until they arrived. (T1 at page 51.)

When the detectives returned, the people that were at the scene were talking to Eric Simmons' father and Eric was standing by the four-wheeler. (T1 at page 51.) The other officers at the scene were not having any contact with the Defendant. (T1 at page 87.) Detective Purdue described the residence as being in a rural area that backs onto state property, pretty much "wilderness." (T1 at page 87.) No one was standing around the Defendant. (T1 at page 88.) Detectives Purdue and Adams approached the Defendant. (T1 at page 51.) They were dressed in shirts and ties and were unarmed. (T1 at page 87.) They walked with Eric to a pine tree not too far away, sat down under the tree to talk to him and showed him a picture of Deborah Tressler. (T1 at page 51.) They asked if he knew her, to which he replied yes, and they told him she had been murdered. (T1 at page 51.) Detective Purdue's uncontradicted testimony was that he asked Eric to come back to the sheriff's office to talk to the detectives and Eric said, "Yeah, I will come back and talk with you." (T1 at page 51.) Detective Purdue further testified that the Defendant was not threatened to come to the sheriff's office, nor was he offered anything. (T1 at pages 52-53.) The Defendant was told he was not under arrest. (T1 at page 53.) The Defendant was to be driven to the sheriff's office in a marked cruiser, and was told that if he needed a ride home after the interview in Tavares

a ride would be provided. (T3 at page 105.)

The testimony varies regarding what happened once the interview under the tree was concluded and the Defendant had agreed to go to the sheriff's office in Tavares. Originally, Detective Purdue testified that the Defendant was not handcuffed. (T1 at page 54.) After the first hearing on the motions to suppress, the Assistant State Attorney advised Detective Purdue that there was a deposition indicating that the Defendant had been handcuffed while being transported. The prosecution also notified opposing counsel and the Court of the inconsistency. The Court allowed additional hearing time on the issue. In the subsequent hearing detective Purdue explained he never saw Mr. Simmons handcuffed. (T2 at page 34.)

The testimony on the issue of the Defendant being handcuffed varied from Larry Simmons' recollection that the Defendant was handcuffed at the tree by an officer in plain clothes and then escorted to a marked car seventy-five or eighty yards away, (T3 at page 9) to Terry Simmons' recollection that his son was cuffed at the four-wheeler, not the tree, by an officer in plain clothes. (T3 at page 16.) Officer Blackman was the deputy who transported the Defendant to the sheriff's office. (T2 at page 7.) His recollection was that he walked about 100 yards with the Defendant toward the cruiser. (T2 at page 7.) When they got to the vehicle the deputy testified he advised the Defendant that he would be transporting him to the sheriff's office to speak with detectives, and advised that he needed to place handcuffs on him for officer safety. (T2 at page 8.) Deputy Blackman testified that he told the Defendant that he was not under arrest. (T2 at page 8.) This testimony was partially corroborated by Deputy Jones who testified Deputy Blackman handcuffed the Defendant at the marked car and heard Deputy Blackman say, "I need to handcuff you for officer safety." (T2 at page 24.)

The Defendant was placed in the back of the cruiser. (T2 at page 8.) The doors in the back do not open from the inside. (T2 at page 8.) Once at the sheriff's office, Deputy Blackman testified he immediately let the Defendant out of the car and took

off the handcuffs. (T2 at page 9.) The deputy escorted the Defendant upstairs to the interview room. (T2 at page 9.) They entered the building through the side entrance, an employee entrance, that the deputy always uses because it is more convenient. (T2 at page 9.) The entrance is secured by a keypad lock. (T2 at page 10.) Once at the interview room on the third floor, the Defendant asked deputy Blackman how he was going to get home and the deputy told him that the sheriff's office would provide him with a way home. (T2 at page 11.)

Deputy Purdue described the interview room as being approximately ten feet by ten feet with room for three people to sit comfortably. (T1 at page 54.) Detective Adams and Detective Purdue conducted the interview. The interview was taped. (T1 at page 55.) The Defendant was read his Miranda warnings, and also signed a written Miranda Waiver. (T1 at page 55.) The formal interview began at 4:40 p.m. as reflected on the written waiver. (T1 at page 55.) Detective Purdue indicated that he and Detective Adams were hungry and sent out for food and told the Defendant they would order for him as well. (T1 at page 58, 60.) They ate Big Macs and french fries, and during the several-hours interview the Defendant was allowed rest room breaks if he wanted them. (T1 at page 58.)

Detective Adams and Purdue took turns conducting the interview, and on one of his breaks, Detective Purdue walked downstairs where fellow officers were executing a search warrant on the Defendant's vehicle. (T1 at page 58.) Detective Purdue was shown blood that had been found in the car. (T1 at page 59.) He returned to the interview room and told the Defendant, "Eric, we just found blood in your car." (T1 at page 59.) Detective Purdue testified that he asked the Defendant what he thought about the find, and the Defendant replied, "Well, if you found blood in my car, I guess I must have did it." (T1 at page 59.) After that, the Defendant was placed under arrest. (T1 at page 59.)

The Defendant contends that the interview was not consensual, and all the statements should be suppressed. In

support of this proposition the Defendant has cited Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985). In Hayes, the police concluded that the defendant was the principal suspect in a burglary-rape case and arrived at his home and spoke to him on the front porch. Id. at 812. When Hayes expressed reluctance to voluntarily accompany the officers to the station for fingerprinting, one of the investigators explained they would arrest him. Id. According to the investigator, Hayes blurted out that he would rather go with the officers than be arrested. Id. Hayes was arrested and convicted, and the District Court of Appeal affirmed the conviction while finding the consent given by Hayes was questionable at best. Id. at 813. The court also expressly found that the officers did not have probable cause to arrest Hayes until after they had his fingerprints. Id. The Supreme Court overturned Hayes' conviction citing the holding in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969): "None of our later cases have undercut the holding in Davis that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment." Hayes at 814.

A simple factual distinction between Hayes and the instant case is that, according to the unrebutted[3] testimony, the Defendant never expressed any reservation in accompanying the detectives to the sheriff's office. Further, the Defendant in this cause was repeatedly told that he not under arrest. The gravamen of the Hayes' holding would still dictate a different result for the instant case even if the Court were to find the interview was not consensual in that the officers herein had probable cause to arrest the Defendant when they approached him at his parents' residence on December 7, 2001, thus the detention was constitutional whether it was consensual or not. However, the Court specifically finds that the interview was voluntary on the Defendant's part.

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[3] The Defendant did not testify.

Although defense counsel has zealously argued that the number of officers at the Pine Lakes residence was so intimidating that when the Defendant was "invited" to the sheriff's office, it was an invitation that could not be declined. The testimony showed that even though there were a number of deputies at the property, only Detective Adams and Detective Purdue approached the Defendant. They sat outside under a tree. The detectives were not in uniform and were unarmed. The other deputies present were not encircling the Defendant or drawing their guns or in any way behaving in an intimidating fashion. The Defendant admitted that he knew the victim and detectives asked him to go to the sheriff's office. According to Detective Purdue, "we asked him, do you know this lady? We showed him a picture. And he said, yes, that he knows the lady. And I said, you know, she's dead. Somebody murdered her. And I said, we're trying to find out what happened to her. Do you want to come back and talk to us for a little bit? Come back to the sheriff's office and talk to us for a little bit? And he said, yeah, I will come back and talk with you." (T1 at page 51.) The detectives did not use threatening or commanding language. There is no indication that the detectives' request was so coercive that the Defendant was not free to decline to speak to them, or that a reasonable person would not have felt free to decline to speak to them.

Although the Defendant was handcuffed and transported in a locked, caged cruiser, the testimony showed that he was informed the reason he was placed in handcuffs was for the officer's safety, and **as soon as** they reached the sheriff's office the handcuffs were removed. Further, Deputy Blackman testified that the Defendant never expressed to him that he did not want to accompany the deputy to the sheriff's office or continue with the plan to speak to the detectives or to go home. (T2 at page 10.) The Defendant was told on at least two occasions that the sheriff's office would provide him with a ride home.

The police did question the Defendant about death of Deborah Tressler, but police questioning about criminal conduct

or activity does not alone convert a consensual encounter into a custodial interrogation. State v. Scott, 786 So. 2d 606 (Fla. 5th DCA 2001). During the interview the Defendant was neither threatened nor handcuffed and was given food and rest room breaks, and was never told that he was not free to leave.

Finally, to the extent the Defendant was confronted with any evidence of guilt, it would have been Detective Purdue's one statement that blood had been found in the Defendant's car. This one statement elicited the spontaneous response from the Defendant as quoted above. Thus, applying the four-part analysis described in Johnson v. State, 800 So. 2d 275 (Fla. 1st DCA 2001) for determining if a defendant is in custody (which encompasses not only formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest) the Court finds the Defendant was not in custody and that the interview was consensual.

Although the Court finds the encounter was voluntary, the following excerpt from a recent Florida Supreme Court decision, Chavez v. State, 832 So. 2d 747, 748 (Fla. 2002) underscores the reasoning that an arrest may be valid without a warrant, and even if the police incorrectly argue that the interview was voluntary, if there is probable cause to arrest a defendant:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." Blanco v. State, 452 So. 2d 520, 523 (Fla.1984). The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Schmitt v. State, 563 So. 2d 1095, 1098 (Fla. 4th DCA 1990). See also

McCarter v. State, 463 So. 2d 546, 548-49 (Fla. 5th DCA 1985) ("Probable cause to arrest exists when facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has [been] or is being committed.")

Here, the officer's tip came from a reliable, identified citizen informant who was unconnected to the crime which was being investigated. That informant, being Chavez's employer and the owner of the property where Chavez lived, had reason to know that Chavez was not a friend of the Ryce child. Ed Scheinhaus, the informant's son, who was also present when the book bag was found in Chavez's trailer, had indicated his shock to his mother when he realized that the book bag contained items which belonged to Jimmy Ryce. He knew that Chavez had seen the televised requests for assistance related to Jimmy's disappearance, and had expressed an interest in them.

The little boy had disappeared months earlier, when he had been expected to return home directly from school, suggesting that he was taken by force. A handgun stolen from Mrs. Scheinhaus was found in the trailer by the informant at the same time the book bag was discovered. Further, the Scheinhaus property where Chavez lived was in the same general vicinity from which the little boy had disappeared. That neighborhood had been saturated with flyers depicting Jimmy, and asking for help. Under these circumstances, it is illogical to suggest that a reasonable person (aware of the

massive effort to locate Jimmy) who merely happened to find the book bag would take it to his living quarters without ever reporting the matter to authorities.

This cumulative information, known at the time Chavez was apprehended, constituted probable cause to arrest Chavez in connection with the Ryce kidnaping. Cf. Justus v. State, 438 So.2d 358, 363 (Fla.1983) (upholding an arrest without a valid warrant based upon "cumulative information" which provided probable cause in a murder/kidnaping case). The fact that the police maintained that Chavez submitted to them voluntarily, or that the State also argued that there was probable cause to arrest Chavez for stealing property of Mrs. Scheinhaus, does not invalidate Chavez's arrest based upon probable cause in connection with Jimmy Ryce's kidnaping. Cf. State v. Carmody, 553 So.2d 1366, 1367 (Fla. 5th DCA 1989) (observing that the validity of Carmody's arrest was not affected where, despite two valid reasons providing probable cause for the arrest, he was arrested on an unsupportable one); McCarter v. State, 463 So.2d at 549 n. 1 (Fla. 5th DCA 1985) (observing that the "fact that McCarter was arrested for attempted first degree murder rather than attempted kidnaping does not invalidate the search incident to the arrest since the label placed upon an arrest by the arresting officer is not determinative of the question of whether the arrest was legal").

In addition to finding that the Defendant's interview with the detectives was consensual, the Court also finds that probable cause existed for the Defendant's arrest at the Pine Lakes

residence on December 7, 2001. Like the Chavez case, the police herein had accumulated information throughout the week, that when put together, supported probable cause for the arrest. It is this type of cumulative information that Detective Purdue was speaking about when he was asked by defense counsel if they had probable cause to arrest the Defendant at his parents. Detective Purdue replied, "After we got back to the office and reviewed our testimonies, had we had that opportunity to do that out there, we probably could have established probable cause for the arrest at that point, but at the time when Kenny and I left, we didn't feel that we had sufficient probable cause. We wanted to talk to Mr. Simmons and to see what he could establish as far as where this investigation should go, what route we should go in. We felt that he being the closest associate, and we believed, at the time, through witness testimony, that he was the last person to be seen with her, that he could provide us with essential information on which route this investigation should have went." Detective Purdue's determination that they did not have probable cause is no more persuasive on the issue than if he had felt there was probable cause.

The prosecutor's summation the 'probable cause' evidence in his closing argument on January 10, 2001 was borne out by the uncontradicted testimony, and was presented as follows:

> ... you have heard that the Defendant was, in fact, the boyfriend of the deceased. You have heard that several people in the Sorrento area told the police that they were familiar with this boyfriend and that he had beaten her up two days previously. They then, when they identified Mr. Simmons not just as "the boyfriend," but as Eric Simmons, determined that he, in fact, had recently been convicted of a crime of violence against another female.
>
> In addition to that, they knew that he was last seen with the deceased. His white car was

> parked in front of the laundromat at a few minutes before midnight on that Saturday night. A car that looked very similar to it, a white car with no tint on the windows, four doors, that appeared Corsica-like was seen three-and-a-half miles away, a five-minute drive, at 437 and 44, with the deceased positively IDed screaming for help and trying to get out.

(T1 at pages 113-114.) Based upon the foregoing findings, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Statements is denied.

DONE AND ORDERED in chambers at Tavares, Lake County, Florida this 15 day of April, 2003.

s/_____
T. Michael Johnson, Circuit Judge

Certificate of Service

I HEREBY CERTIFY a true and correct copy of the foregoing order was sent via U.S. Mail this 15 day of April, 2003 to the following:

Jeffery Pfister
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Janice Orr
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Bill Gross, ASA,
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Tavares, Florida 32778

s/_____
Judicial Assistant

(3)

Supreme Court, U.S.
FILED
FEB 0 6 2007
OFFICE OF THE CLERK

No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
CAPITAL CASE

1. Whether this Court has jurisdiction to consider the case at bar.

2. Whether the lower courts misconstrued this Court's holdings such that the Petitioner's Fourth Amendment rights were violated in admitting certain evidence and whether those holdings have and will result in violations of the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the admission of a questionable confession violates the Equal Protection Clause of the Fourteenth Amendment and whether this Court's guidance in such cases is required.

4. Whether the standard of review for this circumstantial evidence case was appropriate and, if not, if the Petitioner's due process rights were violated; and whether review of such cases requires this Court's actions to ensure equal protection under the law.

5. Whether the lower courts failed to apply the appropriate standards set by this Court in admitting out-of-court identifications in violation of the Petitioner's Fourteenth Amendment rights.

6. Whether the issue of permitting expert testimony requires this Court's intervention to resolve disputes between the several States and between the Federal circuit courts.

7. Whether the circumstances of this case were such that it constituted a violation of the Petitioner's due process rights in disallowing an expert on eyewitness testimony.

8. Whether the lower courts inappropriately applied this Court's well-established holdings in determining that a search warrant was appropriately issued and, therefore, whether the Petitioner's Fourth Amendment rights were violated by admitting evidence which was ill gotten.

9. Whether the trial court lacked venue to hear the case and whether the lower courts applied the wrong standard in making their determinations.

10. Whether, with all of the errors and the violations of the Petitioner's constitutional rights, the trial was a fair trial as required under the Fourteenth Amendment. The totality of the circumstances upon which the Florida Supreme Court heavily relied overwhelmingly demonstrates that the trial was not fair and justice requires that the lower court decision be overturned.

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REASON IV 4

RESPONDENT'S OPPOSITION MISSTATES PETITIONER'S ARGUMENT WHICH CONCERNS THE STANDARD OF REVIEW APPLIED BY THE FLORIDA SUPREME COURT IN THE INSTANT CASE

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No. 06-812

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SIMMONS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Eric Simmons, respectfully replies to the Brief in Opposition filed by Respondent to the Petition for a Writ of Certiorari to the Supreme Court of the State of Florida in this case.

STATEMENT

Respondent has quoted the decision of the Florida Supreme Court as its Statement of the Case and Facts. Petitioner has addressed the errors in the lower court's "facts" in its Petition and will not reargue those matters here. Petitioner would note,

impossible to address nebulous allegations. Petitioner based its facts on the record of the case.

RESPONSES TO REASONS IN OPPOSITION

REASON I

THIS COURT HAS JURISDICTION TO CONSIDER THE CASE AT BAR

Respondent argues that this Court lack jurisdiction to hear the Petition filed in this case. Its argument is based upon the fact that there was a pending motion filed by Petitioner at the Florida Supreme Court at the time of the filing of the Petition.

Petitioner contacted the Clerk of this Court to determine whether the filing of the Petition should be delayed during the pendency of that motion. Petitioner was granted one extension to permit the Florida Supreme Court more time to act, but was told to file the Petition as ordered by this Court when the lower court failed to act in a timely manner.

Certainly the Clerk of this Court is well aware of the Court's jurisdictional requirements and instructed Petitioner properly. Petitioner was told that a supplemental Petition could be filed if the eventual action by the lower court warranted. However, the Florida Supreme Court issued a summary denial of the Petitioner's Motion on January 10, 2007, which was submitted to this Court by Respondent. The Florida Supreme Court's action is, therefore, has no impact on this Court's decision on the Petition as filed. This reason in opposition is without merit.

REASON II

THE FLORIDA SUPREME COURT'S DECISION CONCERNING THE VOLUNTARINESS OF PETITIONER'S STATEMENTS IS CONTRARY TO THIS COURT'S DECISIONS AND THE CONSTITUTION OF THE UNITED STATES

Respondent alleges that Petitioner has failed to demonstrate that the decision of the Florida Supreme Court is contrary to decisions of this Court and violative of Petitioner's Fourth Amendment rights under the Constitution. This is argued fully in the Petition.

The lower court's decision is a gross misinterpretation of both *Hayes v. Florida*, 470 U.S. 811 (1985), and *Kaupp v. Texas*, 538 U.S. 626 (2003), as well as the cases citing those decisions. Respondents efforts to give credence to the Florida court's reading of those cases falls far short. It claims that because the two detectives who directly spoke to the Petitioner were allegedly unarmed one can ignore the other over one dozen armed officers, numerous squad cars filling the driveway of the Petitioner's parents' home, and the police helicopter hovering overhead. Respondent claims that the handcuffing of the Petitioner was "brief", occurring only during the "voluntary" transportation of Petitioner in the back of a locked, marked unit. It is preposterous to reach the conclusion that the Petitioner could possibly have believed he was free to simply walk away.

Respondent attempts to bolster its argument by citing *United States v. Mendenhall*, 446 U.S. 544 (1980). If anything, that case supports Petitioner's argument. However, that case involved an investigative stop. The defendant in that case was

deemed to be suspicious behavior. That situation is very different from the majority of the sheriff's office arriving at the home of the Petitioner's parents as is the case here.

The only other issue addressed in this argument by Respondent is that of probable cause. Respondent adds nothing to the decision of the Florida Supreme Court and the Petitioner's argument on that matter was made in the Petition.

The opposition on this issue is without merit and the writ should be issued.

REASON III

PETITIONER HAS NOT REQUESTED AN ADVISORY OPINION AND THE OPPOSITION IS WITHOUT MERIT

Respondent states that Petitioner is seeking an advisory opinion from this Court. No where in the Petition was any such request made. The argument made by Petitioner concerning the lower court's reliance on the so-called confession in this case is set forth in the Petition and remains unrefuted by Respondent.

REASON IV

RESPONDENT'S OPPOSITION MISSTATES PETITIONER'S ARGUMENT WHICH CONCERNS THE STANDARD OF REVIEW APPLIED BY THE FLORIDA SUPREME COURT IN THE INSTANT CASE

Respondent claims that Petitioner is requesting this Court to make a factual determination on this case. While the facts must certainly be reviewed, the argument of Petitioner in its third basis

the standard of review applied by the Florida Supreme Court in its decision and due process considerations concerning the circumstantial nature of this case.

Instead of arguing the matters of substance, Respondent reiterates its unsubstantiated claim that Petitioner is misstating facts and simply reiterating the decision of the Florida Supreme Court. Respondent fails to address the import issue upon which review is requested by this Court, namely the propriety of the standard of review in circumstantial evidence cases, particularly in cases in which the State is attempting to take a man's life. To say that this is of no public import and does not involve constitutional issues defies logic. Respondent's opposition is without merit and review on this issue is warranted.

REASON V

THE FLORIDA SUPREME COURT MISAPPLIED THIS COURT'S HOLDING IN *NEIL V. BIGGERS*

Respondent's argument on this issue is curious but is consistent with its argument elsewhere in its opposition. Respondent claims that merely citing to the applicable law makes whatever decision is reached all right and precludes this Court's review of the matter. It seems to be of no moment to Respondent that the substance of the controlling law is followed.

As argued in the Petition, the Florida Supreme Court misapplied the criteria set forth by this Court in *Neil v. Biggers*, 409 U.S. 188 (1972), in determining the matter of admissibility of out-of-court identifications. By improperly applying the law, the decision necessarily conflicts with the decision of this Court and the cases citing it.

Respondent does not refute any of the substantive argument on this issue. The opposition on this matter is without merit and the issuance of the writ is warranted.

REASONS VI AND VII

PETITIONER IS NOT REQUESTING THE ESTABLISHMENT OF A BRIGHT-LINE RULE ON EXPERT WITNESS TESTIMONY ON EYEWITNESSES AND REVIEW OF THIS ISSUE SHOULD BE GRANTED

Respondent lumps two issues raised by Petitioner concerning eyewitness testimony and the use of experts on this issue. Petitioner stands by the arguments made in the Petition and addresses only the brief opposition to this matter raised by Respondent.

Respondent argues that the trial judge had wide discretion under applicable Florida law and there is, therefore, no basis for this Court's review on this issue. As more fully outlined in the Petition, this issue caused several justices to write concurring opinions in the decision of the Florida Supreme Court in this case expressing their concerns over the many problems which have arisen concerning eyewitness testimony. As demonstrated in the Petition, courts across the country have been grappling with this problem. The result has been conflicting resolutions to this problem, which requires the review of this Court.

Respondent's opposition simply ignores the arguments raised by Petitioner. Its opposition is without merit. Review by this Court is warranted and highly necessary. This is a matter of great public importance.

REASON VIII

THE FLORIDA SUPREME COURT'S DECISION ON THE SUPPRESSION OF EVIDENCE FROM THE VEHICLE WAS WRONGFULLY DECIDED AND RESULTED IN A VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS

Respondent's argument is virtually the same as that in its opposition in Reason V, *supra*. Here, it claims that because the Florida Supreme Court "recognized" this Court's holding in *Franks v. Delaware*, 438 U.S. 154 (1978), anything from that point on is all right. Application of the law appears inconsequential to Respondent. Beyond reiterating the statements made by the Florida Supreme Court, Respondent continues its allegations that Petitioner is fabricating facts. Again, there is nothing to refute as this is no more than a bare allegation.

One point raised by Respondent in footnote 7 is worthy of note. It claims that the detective's observation of blood in the Petitioner's vehicle (an allegedly bloody sheet) was not refuted. That sheet was presented to the trial judge during the suppression hearing. No blood could be found on that sheet nor did the State at the trial level ever again claim that there was any blood on the sheet. The Respondent and the Florida Supreme Court's statement of "facts" is inaccurate in many other respects as well, as pointed out in the Petition.

Review by this Court on this issue is warranted. The Opposition is without merit and the arguments in the Petition that the Florida Supreme Court's ruling was contrary to this Court's law the violative of the Petitioner's Fourth Amendment rights stand.

REASON IX

THE PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE FLORIDA SUPREME COURT'S RULING ON THE ISSUE OF VENUE

Respondent claims that there is no Federal constitutional claim raised by Petitioner in the issue concerning venue. Respondent has chosen to ignore the Sixth Amendment to the United States Constitution. It is the Petitioner's rights under this constitutional provision upon which review is sought. The Opposition on this issue is without merit.

REASON X

REVIEW BY THIS COURT IS WARRANTED ON THE BASIS OF DUE PROCESS VIOLATIONS WHICH OCCURRED THROUGHOUT THE JUDICIAL PROCEEDINGS IN THIS CASE TO DATE

Respondent's argument in Reason X is the same as that throughout its Opposition, *i.e.*, the Petitioner misstates facts and the Florida Supreme Court's decision is correct.

Petitioner has presented numerous bases to this Court which warrant its review. Petitioner has consistently maintained his innocence of the crimes alleged. While it is understood that actual innocence alone is not the basis for review by this Court, it is certainly something which cannot be ignored. The number of wrongful convictions is legend and is a black mark on the whole judicial process. The reasons for those wrongful convictions are almost all present in the instant case. This should not be

overlooked by this Court in reaching a decision on whether a review of the case is warranted.

As the Petition demonstrates, Petitioner's constitutional rights were violated in many ways, the trial court initially made erroneous determinations of law and the Florida Supreme Court did little more than rubber stamp the trial court's errors.

This is a capital case which warrants the closest scrutiny. The very life of the Petitioner rests in the balance. It is respectfully requested that this honorable Court review this case to make a determination for itself as to whether the constitutional rights of the Petitioner were upheld and whether the courts below properly applied this Court's rulings. It is sincerely believed that, should this Court grant the writ sought, it will determine that the Petitioner's arguments are meritorious.

CONCLUSION

Respondent's Opposition contains little if any substance. The Petitioner has provided this Court with numerous reasons for its review. It is respectfully requested that this Court issue the writ for certiorari to the Florida Supreme Court to review the matters addressed in the Petition.

Respectfully submitted,

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